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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

13 CR 420 (GBD)

5 MESSIAH CLARK,

6 Defendant.

7 -----x

8
9 October 3, 2014
9:27 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

BY: BROOKE CUCINELLA

18 MARGARET GARNETT

Assistant United States Attorneys

19 DONALD YANNELLA

Attorney for Defendant

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(In open court; jury not present)

MS. GARNETT: Good morning, your Honor.

Just as housekeeping, I'm going to handle the charge conference myself, so there's no need to wait for Ms. Cucinella. As soon as Mr. Yannella arrives, we'll be ready to go.

THE COURT: Sure. (Pause)

Ms. Garnett, what's your intention? Do you intend to present any further evidence?

MS. GARNETT: Yes, Judge. I mentioned this to your Honor's law clerk last night so your Honor would be informed, but we don't intend to call a witness. We were able to reach last night with Mr. Yannella a stipulation, a testimonial stipulation about what an IRS witness would testify to regarding corporate filings for MSM Tax Services. So our intention this morning is to read that stipulation and then rest.

THE COURT: Mr. Yannella, do you intend to call any witnesses?

MR. YANNELLA: No, your Honor.

THE COURT: Then what I'll do is -- as a matter of fact, we'll go ahead and -- I don't think we have all the jurors here yet. We'll go ahead and finish up the testimony -- you want to make a motion now, Mr. Yannella?

MR. YANNELLA: Yes, your Honor.

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1 I make a motion at the close of the government's case
2 to dismiss the charges pursuant to Rule 29 on the grounds that
3 the government has not put forth a prima facie case
4 establishing all the elements of the nine different counts in
5 the indictment; the identity theft, the theft of federal funds
6 or submitting false claims. They haven't proved that my client
7 is the one who committed those acts.

8 THE COURT: Did you want to be heard?

9 MS. GARNETT: Your Honor, we oppose the motion. I'm
10 happy to say more, if your Honor needs me to, but I don't want
11 to waste time.

12 THE COURT: Well, I'll consider the motion to have
13 been made at the close of the government's case and renew it
14 after defense rests.

15 I'm going to deny the motion. I think that obviously
16 there's strong direct evidence that a crime was committed, and
17 I believe in this case strong circumstantial evidence that the
18 defendant was the one who committed this crime. And at least
19 sufficient evidence for the jury, at least for the jury to
20 conclude that, given the nature of the crime and the use of
21 Mr. Clark's name and his home and other places and businesses,
22 there is strong circumstantial evidence that a reasonable jury
23 could conclude that Mr. Clark was the person who committed this
24 crime. So I'm going to deny those motions.

25 Do you have anything on the charge, Ms. Garnett?

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1 MS. GARNETT: I just have a couple of, I think, small
2 things, your Honor.

3 The first thing that I have is on page 43 of your
4 Honor's proposed charge. On the venue section, we just would
5 ask that your Honor instruct them that on venue and venue alone
6 the standard is preponderance of the evidence.

7 THE COURT: I usually avoid doing that because I don't
8 want to confuse the jury about two different standards, unless
9 there's a real genuine dispute about venue. Since here in the
10 case it's clear that Manhattan, Bronx and -- which counties --

11 MS. GARNETT: Orange County.

12 THE COURT: Orange County, there's such strong
13 evidence that I don't really want to confuse them. If you want
14 me to, I'll consider it, but --

15 MS. GARNETT: No, Judge. I think that's a fair point.
16 And I just wasn't sure whether that was a deliberate choice or
17 an oversight. So we're fine with the charge as written. I
18 just wanted to raise it in case it was an oversight by your
19 Honor. I agree that venue is not really in dispute in the
20 case.

21 The second thing, your Honor, it's on page 48 of your
22 Honor's proposed charge, about excusing alternate jurors. In
23 particular, because today is a Friday and they may not finish
24 deliberating today, we would ask that your Honor not discharge
25 the alternates -- send them home, of course, but ask them to

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1 not discuss the case until they've been notified by your
2 Honor's chambers that the case is resolved.

3 So we've had a number of criminal trials just in the
4 last month or so where we lost jurors during deliberations; a
5 case in front of Judge Forrest a couple of weeks ago and
6 another in front of Judge Engelmayer. So I have a concern with
7 the weekend that we might need an alternate, if they don't
8 finish today. So we just would ask that your Honor not
9 discharge them. Send them home and ask them not to discuss the
10 case until they hear otherwise.

11 THE COURT: Well, I don't keep them unless both sides
12 are going to agree that if we lose a juror during
13 deliberations, that we can substitute an alternate without the
14 defendant's agreement. I don't think I have the authority to
15 do that.

16 MS. GARNETT: Your Honor, I don't think that that is
17 accurate. Again, we've just dealt with this issue a couple of
18 times within the last month. It is entirely within your
19 Honor's discretion to substitute an alternate juror who has not
20 yet been discharged, even after deliberations have begun. The
21 defendant's consent is not required.

22 THE COURT: Mr. Yannella, what's your position?

23 MR. YANNELLA: Judge, if we did lose a juror, I would
24 discuss it with my client and I'd be inclined probably to
25 substitute a juror. But I should discuss that more fully with

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1 him before making that representation to the Court. But I
2 would be inclined ahead of time to make that commitment.

3 THE COURT: I understand your excess of caution, and I
4 even understood it with the four alternates, which I didn't
5 really agree that we needed four alternates, but you were more
6 comfortable with it.

7 But this is a case where if some juror gets sick on
8 Monday, they'll come back on Tuesday. We'll take off Monday.
9 I've had 25 years on the bench, I've never had that problem.
10 But if you want me to keep them, quite frankly, I think it's a
11 little unfair to make all four of them stick around.

12 MS. GARNETT: Your Honor, to be clear, they would be
13 free to leave and go back to their jobs. So they just would
14 not be discharged from their oath as jurors; in other words,
15 they couldn't discuss the case or do research until a verdict
16 had been reached.

17 THE COURT: Well, I'm not sure they would be free to
18 leave. They'd have to be here on Monday.

19 MS. GARNETT: Judge, in my experience, when this path
20 was followed, those jurors are free to go about their lives.
21 They don't have to come back unless the Court calls them back,
22 and then it would just be a small burden on your Honor's
23 chambers to notify those four alternates when a verdict was
24 reached that they at that point were discharged and could
25 discuss the case or do whatever they want to.

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1 THE COURT: Let Mr. Yannella discuss that with his
2 client. We'll discuss that before we send the jury out. And
3 let me look at the rule and remind myself of it.

4 Anything else?

5 MS. GARNETT: Yes, Judge. The last point is an actual
6 legal point.

7 On pages two and three of your Honor's substantive
8 instructions, on the false claim charge, we had requested --
9 and I would renew that request -- that your Honor define for
10 them what claim means in the context of this statute. We had
11 proposed language -- it's on page five of the government's
12 requests to charge -- that a claim is a demand for money or for
13 transfer of public property. A presentation is made when a
14 fraudulent tax return is signed and filed, as well as when
15 refund checks obtained for fraudulent tax returns are deposited
16 or cashed. And in your Honor's proposed charge, it doesn't
17 define what presented a claim means. So we just would ask for
18 that further clarification.

19 THE COURT: I don't have a strong feeling one way or
20 the other about that. Quite frankly, it is beyond my
21 comprehension that the jury doesn't understand what claim we're
22 talking about.

23 MS. GARNETT: Your Honor, I do agree that they know
24 what claim we're talking about. I think that our concern is
25 really more about this presentation point, because I don't

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1 think it's obvious to a layperson or to the average juror that
2 you can present a claim within the meaning of the statute
3 either when the tax return is signed or filed or when you get
4 the refund check and you cash it or deposit it. So we do think
5 that it's an important clarification.

6 MR. YANNELLA: Judge, I don't think there's any danger
7 of that type of confusion. I'm satisfied with the instruction
8 that your Honor has given them.

9 THE COURT: Let me just look at -- what page were
10 you --

11 MS. GARNETT: It's on page five.

12 THE COURT: I have your page five, but where would you
13 want it?

14 MS. GARNETT: So, your Honor, it would go at the top
15 of your page three, at the end of the description of what the
16 first element is. So right after when you say "the defendant
17 knowingly made or presented a claim to the IRS," and then we
18 would just ask that you define claim and present it within the
19 meaning of the statute.

20 And that's all that I have, your Honor

21 THE COURT: I'll probably give you some simple
22 language, but I just don't like the way the second sentence is
23 phrased. And, quite frankly, we're talking about more than
24 refund checks. So I think that --

25 MS. GARNETT: That's fine, your Honor. I think it's a

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1 relatively small point. It just was --

2 THE COURT: I don't think it really matters. But if
3 you want it, I'll say a claim is a demand for money. I don't
4 know if we have to say transfer of public property.

5 MS. GARNETT: That's fine, Judge.

6 THE COURT: And then it's presented when a fraudulent
7 return is signed and filed, as well as when --

8 MS. GARNETT: And I think for the last, if we wanted
9 to simplify, we could say, as well as when any government money
10 is deposited or cashed. And that would be fine with the
11 government.

12 THE COURT: I'd rather not say anything, but I'd
13 rather just say that, as well as when a refund is obtained.

14 MS. GARNETT: That's acceptable. That's acceptable
15 also, your Honor. Thank you.

16 THE COURT: Then I'll give you that language. I'll
17 write it out and give you that language.

18 Anything else from the government on the charge?

19 MS. GARNETT: No, your Honor. That was our last.

20 THE COURT: Anything?

21 MR. YANNELLA: Judge, I don't have any objections, but
22 the one thing I wanted to say is that I might comment on
23 witnesses not called.

24 THE COURT: Okay.

25 MR. YANNELLA: So I didn't think that should

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1 necessarily be removed.

2 THE COURT: Okay. So what page is that? Uncalled
3 witnesses on page 33?

4 MR. YANNELLA: Thirty-two.

5 THE COURT: All right. So you're going to raise that
6 issue, so I should leave that one in?

7 MR. YANNELLA: Yes, your Honor.

8 THE COURT: Okay. I think all our jurors are here, so
9 let's bring them in.

10 I'll turn to the government. The government can
11 present the rest of their evidence and then rest. And I'll
12 turn to defense and ask whether or not you wish to call any
13 witnesses, and then you can rest and we'll go into the
14 summation.

15 Let's get the jury.

16 (Continued on next page)

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(In open court; jury present)

THE COURT: Ms. Garnett, anything further on behalf of the government?

MS. GARNETT: Yes, your Honor. The government has one additional stipulation to offer.

THE COURT: Sure.

MS. GARNETT: This stipulation is marked for identification as Government Exhibit 1508.

It is hereby stipulated and agreed, by and among the United States of America, by Preet Bharara, United States Attorney for the Southern District of New York, Brooke E. Cucinella and Margaret Garnett, Assistant United States Attorneys of counsel, and Messiah Clark, the defendant, by and with the consent of his attorney, Donald Yannella, Esquire, that, if called to testify, Dennis Laffin, an analyst at the Internal Revenue Service, would testify as follows: One, employer identification number, or EIN, 26-3003212 is registered to MSM Tax Services, Incorporated. EIN 45-4513764 is registered to MSM Tax Prep and Accounting, Incorporated.

Two, IRS form 1120 is the US corporation income tax return. The IRS requires that any US corporation other than nonprofit entities registered under Section 501 to file form 1120 each tax year, whether or not they have taxable income. A search of the IRS internal databases for each year from 2007 through 2013 found no record of any form 1120 filings for

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1 either EIN 26-3003212 or EIN 45-4513764.

2 Three, IRS form 940 is the employer's annual federal
3 unemployment tax return. The IRS requires that any employer
4 who paid wages of \$1,500 or more to employees in any calendar
5 quarter of the year or who had one or more employees for at
6 least some part of 20 weeks in the year file a form 940 each
7 year. A search of the IRS internal databases for each year
8 from 2007 through 2013 found no record of any form 940 filings
9 for EIN 26-3003212 or EIN 45-4513764.

10 Four, IRS form 941 is the employer's quarterly federal
11 tax return. The IRS requires that all employers file form 941
12 quarterly to report wages they paid employees and various tax
13 payments withheld from those wages. Only seasonal employers
14 who pay no wages in any given calendar quarter, employers of
15 household employees and employers of farm employees are exempt
16 from filing form 941. A search of the IRS internal databases
17 for each year from 2007 through 2013 found no record of any
18 form 941 filings for EIN 26-30303212 or EIN 45-4518764.

19 It is further stipulated that this stipulation may be
20 received in evidence as a government exhibit at the trial at
21 the above referenced matter. It's dated today, October 3,
22 2014, signed by me on behalf of the United States Attorney and
23 Mr. Yannella on behalf of Mr. Clark.

24 Your Honor, at this time we offer Government
25 Exhibit 1508.

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1 THE COURT: Any objection?

2 MR. YANNELLA: No, your Honor.

3 THE COURT: It will be admitted into evidence.

4 (Government's Exhibit 1508 received in evidence)

5 MS. GARNETT: The government rests.

6 THE COURT: Mr. Yannella, do you wish to call any
7 witnesses on behalf of the defendant?

8 MR. YANNELLA: No, your Honor.

9 THE COURT: Defense rests?

10 MR. YANNELLA: Defense rests.

11 THE COURT: Ladies and gentlemen, both sides have
12 rested. Now we're going to move straight into the summations
13 or closing arguments of the lawyers.

14 Did you have something else?

15 MS. GARNETT: If we could have just one moment, your
16 Honor. (Pause)

17 We're ready to proceed, your Honor.

18 THE COURT: Ladies and gentlemen, as I said, we're
19 going to have the summations or closing arguments of the
20 lawyers. Then I'm going to instruct you on the law and send
21 you in to begin your deliberations.

22 Let me just remind you of two things before we begin.
23 What the lawyers say is not evidence, and it is your
24 recollection of the testimony that controls. So with those two
25 reminders, we'll first start with the closing argument for the

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1 government by Ms. Cucinella.

2 MS. CUCINELLA: Messiah Clark has stolen hundreds of
3 thousands of dollars from the United States Treasury. He did
4 it by filing hundreds of fraudulent tax returns, by creating
5 fake W-2s and stealing the refunds issued by the government.
6 He did it by preying upon some of the most vulnerable members
7 of our society. He took advantage of people that he knew no
8 one was looking out for, and he did it out of nothing more than
9 greed, pure and simple.

10 Because of what he did, Messiah Clark is charged in a
11 nine-count indictment, three counts of defrauding the federal
12 government with respect to claims, three counts of theft of
13 federal government funds and three counts of identity theft.
14 One in each type of charge for each of the three tax fraud
15 schemes he committed in 2008, 2011 and 2013. After the closing
16 statements Judge Daniels will instruct you on the law. And
17 what Judge Daniels says controls.

18 But, in brief, I expect that he will tell you that to
19 find the defendant guilty on the fraudulent claims counts, you
20 must find that the defendant made a false, fictitious or
21 fraudulent claim or a demand for money to the IRS, which is a
22 department or agency of the United States.

23 To find the defendant guilty on the theft of
24 government funds counts, you must find the defendant
25 intentionally stole more than \$1,000 of money that belonged to

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Ms. Cucinella - summation

1 the United States government.

2 Finally, to find the defendant guilty of the identity
3 theft counts, you must find that the defendant unlawfully
4 transferred, possessed or used a means of identification which
5 can include the name, Social Security number or date of birth
6 of another person in connection with the theft of government
7 funds.

8 Judge Daniels will, of course, provide you with more
9 detailed instructions on each of these charges.

10 Now, anyone who sat through this trial knows that it
11 can't be seriously disputed that these identities were stolen
12 and that the tax returns were fraudulent, and those refunds and
13 stimulus checks that were sent out by the government, that they
14 were not actually owed. There's no real question of that. No
15 one here seriously thinks that Juana Cardona or Thomas
16 Rodriguez filed those tax returns or that they authorized
17 Messiah Clark or anyone else to file those returns in their
18 names. That didn't happen.

19 And while it is true that you didn't hear from every
20 individual in whose name or whose Social Security number was
21 stolen and used to file a tax return, you heard from a number
22 of them. And you saw their reactions on that witness stand.
23 You heard Glenn Womack say that he recognized the defendant as
24 someone who had worked on the transport staff at the nursing
25 home where he has lived since 2007. And you watched as

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Ms. Cucinella - summation

1 Mr. Womack looked directly at Messiah Clark and testified that
2 he never authorized that man to file a tax return in his name.

3 There can be no suggestion that they were in on the
4 scheme or in some way complicit. Indeed, there is no question
5 that the opposite is true.

6 And that brings us to the only real dispute in this
7 case: Whether Messiah Clark is the person who did these
8 things.

9 We told you at the beginning of this case, way back on
10 Tuesday, 24 witnesses ago, that by the end of this trial, if
11 you listened to the evidence and used your common sense, you
12 would see that that evidence shows that the defendant is guilty
13 of every single one of the counts with which he is charged, and
14 that there is no doubt that it was Messiah Clark who
15 perpetrated this fraud. This wasn't a long trial, so I'm not
16 going to spend too long up here talking to you. But I want to
17 focus the time that I do spend on walking you through exactly
18 how all of the testimony and all of the documents that you saw
19 proved conclusively that Messiah Clark is the man who stole
20 those identities, who filed those tax returns, who took that
21 money.

22 I'm going to talk to you about how you know that
23 Messiah Clark is guilty. Let's start with 2008, which relates
24 to Counts Four, Five and Six of the indictment. First, how do
25 we know that it was Messiah Clark who filed those returns?

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Ms. Cucinella - summation

1 Let's look at what Messiah Clark was doing in 2008.
2 He was working at Coler-Goldwater as a community assistant, and
3 he was making somewhere between 11 and \$17 an hour. You heard
4 Howard Kritz testify that there were no issues with his
5 performance on the job. Exhibit 100 tells you that he and his
6 wife had just purchased a new home on Story Avenue and that
7 they were carrying a \$335,000 mortgage. Messiah Clark went to
8 work every day, he earned his hourly wage, and he wanted more.

9 Who did Clark see on a daily basis? Who was right in
10 front of him? You know who. Albert Regan, Glenn Womack.
11 Messiah Clark saw people like Glenn Womack at work every day.
12 But instead of viewing Mr. Womack as a person or an individual,
13 he saw him as an opportunity. He saw dollar signs. He knew
14 that the people at Coler-Goldwater weren't working. He knew
15 that those patients weren't filing tax returns.

16 You heard Richard Minott testify that the majority of
17 the people on the 2008 list provided to him by the IRS, the
18 people in whose name 2007 tax returns had been filed, were
19 patients at Coler-Goldwater. Almost everyone on that list was
20 confirmed as a patient, and almost everyone on that list was
21 confirmed as a patient at some hospital within the New York
22 City Health and Hospitals network.

23 And you saw with your own eyes how each of those
24 victim witnesses reacted to seeing their names and Social
25 Security numbers and their birth dates on a tax return that

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Ms. Cucinella - summation

1 they didn't create, a document they never saw until someone
2 from the government knocked on their front doors.

3 You also saw right in front of you in this courtroom
4 what all of these victims had in common: Some sort of
5 vulnerability; whether a physical disability, their age, or in
6 the case of Carmen Lajara, the inability to read. The victims
7 here were all people who were unlikely to be monitoring their
8 credit or engaging in activities where this crime would come to
9 light. This was no coincidence. This was by design. And this
10 is one of the ways that you know that Messiah Clark was the one
11 who filed these tax returns. He knew these people were sick,
12 disabled, retired. He knew they weren't filing tax returns.
13 And he knew he could steal their names. He believed he could
14 get away with it.

15 How else do you know that it was Messiah Clark that
16 filed those tax returns? You know because the scheme in 2008
17 lacked what we'll call creativity. First, it lacked creativity
18 with respect to the addresses he used. Of the 113 tax returns
19 filed in connection with the 2008 scheme, 77 of those
20 individuals supposedly lived at 2018 Story Avenue.

21 You know from Government Exhibit 801 and Exhibit 100A
22 that 2018 Story Avenue is a single-family dwelling. And it
23 wasn't just any single-family dwelling; it was the one that
24 Messiah Clark lived in with his wife. You know that from
25 Messiah Clark's driver's license and from his car insurance.

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Ms. Cucinella - summation

1 That was his home. And it was also supposedly the place out of
2 which MSM Tax Services was run. There is no doubt that Messiah
3 Clark is inextricably intertwined with 2018 Story Avenue. He
4 used his own address on 77 of the returns in 2008.

5 What other addresses were used in connection with the
6 2008 scheme? 758 Dumont Avenue. According to the returns
7 filed in 2008, 31 of those people supposedly lived at this
8 address in this building.

9 What else was supposedly happening at this address?
10 AJA Tax Services was purportedly being run out of there. Where
11 else did we see AJA Tax Services? On the checks in Messiah
12 Clark's personal account. Many checks made out to MSM Tax
13 Services, Messiah Clark's fake company, and to Lamont Kemp,
14 Messiah Clark's fake name. Lamont is Clark's middle name. And
15 where did the Kemp come from? Remember his passport
16 application? It was his father's last name. The checks were
17 also made out to Messiah Clark himself. There is no question
18 that Messiah Clark was connected to 758 Dumont Avenue.

19 Another address you see in connection with the 2008
20 scheme, 1368 Metropolitan Avenue, apartment 5D, another address
21 connected to Messiah Clark. How do you know? Remember the
22 driver's license that he showed to Tyrone Hill at the Bentley
23 dealership? 1368 Metropolitan Avenue, apartment 5D. He also
24 listed it on an application for health benefits while he was
25 working at Coler-Goldwater. This was before he and Ms. Vaughan

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Ms. Cucinella - summation

1 had their child in late 2005, the child whose first initial
2 starts with M, the final M in MSM Tax Services; messiah,
3 Shavanda, and M for the child. So Messiah Clark didn't get
4 real creative with the addresses in 2008.

5 What else didn't he get creative with? The W-2s.
6 Ninety-five of the one hundred thirteen tax returns he filed
7 claimed that the filers worked for New York City Health and
8 Hospitals Corporations. You heard Nancy Doyle tell you that
9 none of those people actually ever worked for New York City
10 Health and Hospitals Corporation. It was made up. Why?
11 Because it was easy. He knew what the W-2 forms from New York
12 City Health and Hospitals Corporations looked like because he
13 had been receiving them for the past eight years. And
14 importantly, he also already had access to the employer
15 identification number, those EINs that you keep seeing. He had
16 access to that number because it was on his W-2, the legitimate
17 W-2s that he received in connection with his work as a
18 community assistant. It was clean. It was simple. And it's a
19 dead giveaway.

20 What are the other companies used in that 2008 scheme?
21 Two pharmaceutical companies, UPS, and of course, AJA Tax
22 Services. Nor was there any creativity that involved how the
23 defendant received the funds in 2008. Seventy-two of the
24 checks were, of course, mailed directly to 2018 Story Avenue.

25 Do we know exactly how Messiah Clark got his hands on

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Ms. Cucinella - summation

1 the checks that weren't sent to 2018 Story Avenue? We don't.
2 But there is no question that he got his hands on them. You
3 can see it in the TD Bank records, the documents in Government
4 Exhibit 410B. These checks were deposited directly into the
5 MSM bank account. Indeed, there were a total of 127 treasury
6 checks deposited into that account, 113 stimulus checks and 14
7 actual refund checks, all caused to be sent out by the IRS by
8 those fraudulent tax returns. The checks ranged in amount from
9 approximately \$300 to \$43,000. They totaled approximately
10 \$127,000. And they all went directly into the MSM bank
11 account, and then into Messiah Clark's pocket.

12 How do we know the money made its way to Messiah
13 Clark's pockets and not to someone else's? You saw the checks
14 that went straight from the MSM bank account to the mortgage
15 company. Ms. Riverso testified that there were four of them,
16 straight out of that MSM business account. And you saw in
17 Exhibit 101 that Messiah Clark paid off the mortgage at 2018
18 Story Avenue in 2009. You can also see in Exhibit 101A that
19 after paying off that mortgage, Clark almost immediately
20 transfers that property into his wife's name, his name no
21 longer on the deed.

22 You also saw and heard from Tyrone Hill, who showed
23 you the Bentley that Messiah Clark bought in 2010. He bought
24 it with a certified check, which Mr. Hill told you was as good
25 as cash.

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Ms. Cucinella - summation

1 And you heard from John Kaplan. He told you about how
2 the defendant turned in his \$13,000 Toyota, along with \$48,000
3 in actual cash, actual dollar bills, which he paid directly to
4 John Kaplan. You watched as Mr. Kaplan sat on that witness
5 stand and pointed out Mr. Clark. He told you that it was
6 Mr. Clark who was the man who handed him that bag of cash so he
7 could drive that Range Rover off the lot. A Toyota to a Range
8 Rover and \$140,000 Bentley? That's quite an upgrade for
9 someone who's earning less than \$20,000 a year for the ten
10 years leading up to those purchases.

11 And it helps tell you what you need to know. There is
12 no question that the defendant is the one who filed those tax
13 returns and caused those economic stimulus checks and those
14 refund checks to be sent. There is no question that those
15 checks were deposited directly into the bank account at TD
16 beginning in 2008 and throughout 2009 and '10, a bank account
17 for which Messiah Clark was the only signatory. And there is
18 no question that Messiah Clark is the one who took that money
19 and spent it. He stole that money. He is the thief. He is
20 the fraud.

21 So what happened next? Messiah Clark is living it up,
22 no mortgage, driving his Bentley, paying his bills, writing
23 \$9,000 checks to Shavanda Vaughan with the memo, "to my wife,
24 enjoy." In May of 2010 he quits his job at Coler-Goldwater and
25 he's got time on his hands, time to get creative; savvy, even.

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Ms. Cucinella - summation

1 You saw the charts that Richard Minott put in evidence
2 showing that while almost all of the identities the defendant
3 used to file the 2008 returns were patients at Coler-Goldwater,
4 the facility at which Mr. Clark worked, Clark branched out for
5 the 2011 scheme. He got his hands on patient lists for other
6 hospitals. But they were all hospitals within the New York
7 City Health and Hospitals network. He was expanding his
8 horizons, growing more sophisticated, branching out.

9 How else was Clark getting more sophisticated? You'll
10 recall Robin Lahiri, the man who testified about
11 FEINsearch.com. He told you that Messiah Clark first bought a
12 subscription to FEINsearch in February of 2009 and that he kept
13 renewing it and using that subscription right up through March
14 of 2013.

15 Let's talk for a minute about exactly what FEINsearch
16 is and why it's important to this case. Robin Lahiri told you
17 that FEINsearch is a web-based database full of information
18 about thousands of American companies, and that the purpose of
19 FEINsearch is to help legitimate companies comply with the law
20 by verifying the EINs of the companies they're doing business
21 with; those employment identification numbers. But you know
22 that that's not what Messiah Clark was doing on FEINsearch.

23 First, how do you know that the person behind the MSM
24 tax at FEINsearch is really Messiah Clark and not some
25 imposter? Well, you know that the person who registered for

Ea3eclal

Ms. Cucinella - summation

1 this membership gave the name Messiah Clark and said he was the
2 owner of MSM Tax Services, located at 2018 Story Avenue;
3 Messiah Clark's home. He gives msmtaxservices@yahoo.com as his
4 e-mail address, and we know that that e-mail address is linked
5 directly back to Messiah Clark. And he pays for the
6 subscriptions using two credit cards in Messiah Clark's name,
7 one of which is clearly a debit card because in the records of
8 Messiah Clark's account at Sovereign Bank, which is Government
9 Exhibit 430, there is an entry for a payment of \$479 just after
10 March 19, 2012, and an entry for another payment of \$479.52 to
11 FEINsearch on March 19, 2013, which matches right up with the
12 FEINsearch records of Messiah Clark's membership activity.

13 And you know that when one of Robin Lahiri's customer
14 service representatives spoke to Messiah Clark in March of 2012
15 to verify that \$479 purchase, she was fully satisfied that the
16 person she spoke with was Messiah Clark. She was satisfied
17 that everything matched up.

18 MR. YANNELLA: Objection. Not in evidence.

19 THE COURT: Overruled.

20 MS. CUCINELLA: So what was Messiah Clark, the Messiah
21 Clark who's sitting right here before you, doing with his
22 FEINsearch subscription? Well, you know that he was maxing out
23 his EIN searches. He used every single search that his paid
24 subscription allowed.

25 Why was he doing those searches? So that he could use

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Ms. Cucinella - summation

1 real EINs of real companies to make fake W-2s; to document
2 fictitious income and to support the refunds he was claiming on
3 tax returns filed in the names of other people.

4 And the information in those searches is telling. His
5 very first search upon joining the service in 2009, his very
6 first search is for AJA Tax Services, the company he claimed
7 five of the 2008 scheme victims worked at and to which he is
8 connected to and a bunch of other ways, as you saw earlier. He
9 does the search and he gets no results. He runs a check on the
10 EIN number that he used for AJA Tax Services on those 2008
11 returns. That EIN number that he puts in is the same number
12 that was on those 2008 tax returns. And he also gets no
13 results. Messiah Clark is verifying that AJA Tax Services is
14 still a fake company. In 2011 he resubscribes on
15 February 28th. And again, the first thing he does is run a
16 search for AJA Tax Services and a reverse search for the EIN
17 number and, again, gets no results.

18 Then a month later he logs back in, on March 31, 2011,
19 and he runs multiple searches for Exxon and Exxon Mobil,
20 finally settling on a search for Exxon Mobil in Texas, the
21 exact company and the exact location that he uses for almost
22 all of the fake W-2s attached to the fraudulent tax returns he
23 files in 2011, Exxon Mobil in Irving, Texas.

24 What's the other company that the rest of the
25 fraudulent taxpayers supposedly worked for in the 2011 scheme?

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Ms. Cucinella - summation

1 Pepsi-Cola Bottling Company, in Albuquerque, New Mexico. Where
2 do we see a search for that EIN? In Messiah Clark's FEINsearch
3 records on July 21, 2011 at 7:41 p.m.

4 There's other important information in the defendant's
5 FEINsearch records. Remember how Robin Lahiri told you that
6 the FEINsearch billing record shows the IP address from where
7 the order originated? Take a look at the IP address from where
8 Clark's March 19th order was placed. Where else have we seen
9 that IP address? Government Exhibit 551. That spreadsheet
10 shows you all the things that the returns filed in 2011 had in
11 common, along with the IP addresses. Whoever filed all of
12 those returns requested that they all be sent to the same bank.

13 Excuse me. Looking back at the IP addresses, sorry,
14 Ms. Chen, it if you could put that back up. The spreadsheet
15 tells you that the IP address from which this FEINsearch order
16 originated is the same IP address where all of those 2011 tax
17 returns were filed from. They match. Who was sitting behind
18 the computer filing tax return after tax return in 2011? The
19 same guy who placed that order in 2012: Messiah Clark.

20 Now, how else do we know that Messiah Clark filed
21 those tax returns? Let's look back at Government Exhibit 551.
22 This time we'll look at the routing numbers. Whoever filed all
23 of those tax returns requested that they be sent to the same
24 bank. That's what this routing number represents. And where
25 were those refunds sent? You know where they were sent. To

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Ms. Cucinella - summation

1 TFG.

2 Teresa Garrido testified that MSM tax had an account
3 with them. Lamont Kemp was listed as the owner. Where did
4 Lamont Kemp and MSM supposedly function out of? You know
5 where; everyone knows where: 2018 Story Avenue. Ms. Garrido
6 told you that the MSM account at TFG had received 121 deposits,
7 worth approximately \$430,000 before access was restricted, as
8 Ms. Garrido described it. How much of that \$400,000 was
9 accessed before that access was cut off? Approximately
10 \$330,000.

11 And where had those TFG cards been sent? To the owner
12 of MSM Tax Services. Note the phone number that he lists.
13 That is the very same phone number that is listed on Messiah
14 Lamont Clark's passport application. Messiah Clark and Lamont
15 Kemp are the same person. Where did those cards go? To
16 Messiah Clark at 2018 Story Avenue.

17 Now, could Ms. Garrido tell you that Messiah Clark is
18 the one who received those cards? No. Is it possible that
19 someone stole them out of the mail? It's possible. It's also
20 possible that one of you is going to win the lottery tonight,
21 and it's possible that I'm going to be appointed the next
22 Attorney General. It's possible. It's not very likely. And
23 more importantly, there is absolutely no proof in this record
24 that something like that happened. What is there proof of?
25 Messiah Clark with access to a whole lot of cash.

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Ms. Cucinella - summation

1 Let's start with Government Exhibit 420A. Who is this
2 a picture of? If you remember Government Exhibit 420A, it was
3 a picture of the defendant, that man, at a bank. He was
4 depositing \$5,000 in cash to the Bank of America in
5 Parkchester. He was doing it at 10:36 a.m. on October 20,
6 2014. You saw the deposit ticket, and you know it matches up
7 directly with the time stamp on that picture. Where did
8 Messiah Clark get that \$5,000 in cash? You know where he got
9 that: From cashing in a TFG cards.

10 What else is there proof of? During this period the
11 defendant was buying a new house, a brand new construction
12 condo for \$270,000. Government Exhibit 110A reflects some of
13 the documents relating to that purchase. It details the
14 finishes that Clark and his wife were requesting, the
15 appliances that they wanted put into that condo. It also shows
16 that Clark received a discount because the home he bought in
17 the spring of 2012 was bought with all cash. Clark reported no
18 income for 2011. His wife reported approximately \$30,000. And
19 they bought a home in all cash?

20 There is no doubt that Messiah Clark is the one who
21 stole this money. There is no doubt that he is the one who
22 filed those tax returns in 2011 using the Social Security
23 numbers, the birth dates and the names of real people. And
24 there is no doubt that he is guilty of Counts Seven, Eight And
25 Nine of the indictment.

Ea3eclal

Ms. Cucinella - summation

1 Ladies and gentlemen, you also know that Messiah Clark
2 did it again in 2013. You know it was Messiah Clark, the real
3 Messiah Clark, because the scheme had the same more
4 sophisticated pattern that we saw in 2011. For example, you
5 saw the 2013 searches Messiah Clark conducted on FEINsearch and
6 you saw the patient list from New York City Health and
7 Hospitals.

8 You also heard from Georgia Hooks, who you will see,
9 if you examine that chart, was never treated at any of the
10 hospitals in the New York City Health and Hospitals network.
11 Where was she treated at? The Bridge, a not-for-profit
12 organization that provides services to the homeless and those
13 suffering from mental illness. Indeed, Messiah Clark stole the
14 identities of six people who were clients at The Bridge and
15 actively receiving their services, the same facility where
16 Clark's wife worked. Do we know how Clark got that
17 information? No. What do we know? Clark was no longer
18 working at New York City Health and Hospitals Corporations. He
19 was branching out.

20 How else do we know that it was Messiah Clark who
21 filed those tax returns in 2013? The IP address. Just like in
22 2011, they were all filed from the same IP address. Where does
23 that IP address go back to? Remember Theron Stubbs, the man
24 who testified from Time Warner Cable? He had a band-aid on his
25 mouth when he was testifying. He told you exactly where those

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Ms. Cucinella - summation

1 IP addresses went back to: A modem that was located inside
2 Messiah Clark's brand new home at 1604 Hawthorne Way in New
3 Windsor, New York, in Orange County, New York, which Judge
4 Daniels will instruct you is in the Southern District of
5 New York.

6 For 2011 we don't have the benefit of records that can
7 tell us exactly where that IP address was assigned to. We just
8 know that they match, which in and of itself is enough to tell
9 you that Clark filed those returns. But in 2013 we have the
10 actual address of the home from where those returns were sent
11 to the IRS. Where? The same home Messiah Clark paid \$270,000
12 in cash for, and the same home at which Messiah Clark was
13 arrested in May of 2013 early in the morning, a few months
14 after those tax returns had been filed.

15 You also know that it was Messiah Clark who filed
16 those returns in 2013 because, again, he continued his pattern.
17 He continues to branch out and he gets more creative with the
18 companies his taxpayers supposedly work at, from Altru Health
19 System, Baker Hughes Oil Field Operations, Bayer Corporation to
20 Regeneron Pharmaceuticals. And every single one of them
21 matches up with the EIN searches that Messiah Clark did using
22 his subscription at FEINsearch.

23 (Continued on next page)
24
25

EA37CLA2

Summation - Ms. Cucinella

1 Every single one of them matches up except for MSM Tax
2 Services. Remember hearing from Georgia Hooks, who told you
3 that she never worked at a company called MSM Tax and
4 Preparation Services? That was the company that appeared on
5 the W-2 filed in her name. Why didn't Clark have to look that
6 EIN up on FEIN Search? Because he already knew it because it
7 was his fake company.

8 And just to address this for a moment -- it's a point
9 I don't think we need to spend much time on -- but how do you
10 know that MSM was a fake company? You heard the stipulation
11 that was read earlier today just before the government rested.
12 You know that MSM never filed corporate tax returns; they never
13 filed any of the documentation to report employees or payroll
14 to the IRS. Why not? Because it wasn't a real company; it was
15 a front for Messiah Clark's scheme, nothing more.

16 Finally, how do you know that Messiah Clark got the
17 money from the tax returns that he filed in 2013? You heard
18 from Eric Tchiakpe at Motivano, who testified that Messiah
19 Clark filled out an application for payroll cards, payroll
20 cards for those fake employees, and you saw the incorporation
21 records and the voided check that he sent to Motivano in
22 connection with that application. That was in 2012. You heard
23 Mr. Tchiakpe tell you that those cards were sent out to 2018
24 Story Avenue. And the records in Government Exhibit 440 show
25 you that they were loaded with tax refunds from the U.S.

EA37CLA2

Summation - Ms. Cucinella

1 Treasury.

2 Now, how do you know that it was Messiah Clark that
3 was accessing those cards? Look at where they were used. You
4 learned from Investigator Song that until the end of 2012,
5 while Messiah Clark was living at 2018 Story Avenue in the
6 Bronx, the cards were accessed at ATMs in the Bronx. But then
7 in 2013 the cards were being accessed in and around New
8 Windsor, New York, at ATMs within a five mile radius from
9 Messiah Clark's new house. Why? You know exactly why.
10 Because Messiah Clark had moved; he moved from the Bronx to New
11 Windsor, New York.

12 You also know that those cards weren't being used for
13 payroll. How do you know that? First, that stipulation. You
14 know that MSM Tax Services never reported paying any employees
15 on any payroll. Why? It wasn't a real company.

16 How else do you know that it was Messiah Clark
17 standing at the ATM making withdrawal after withdrawal? Look
18 at the patterns of how they were used. The way that these
19 cards are used is consistent with one person being in
20 possession of multiple cards.

21 Investigator Song walked you through Government
22 Exhibit 856, and you saw those patterns: Multiple cards being
23 used at one location, back-to-back cash withdrawals, day after
24 day at ATMs right down the street from each other, hundreds of
25 dollars each time.

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Summation - Ms. Cucinella

1 How much did Messiah Clark get from this scheme? The
2 records show that he was able to access approximately \$44,000
3 before he was arrested in May of 2013.

4 There is no question that Messiah Clark is guilty of
5 Counts One, Two and Three as charged in the indictment.

6 Messiah Clark's scheme evolved from what was almost a
7 careless plan, in which he deposited treasury checks directly
8 into his bank account; it evolved into a more sophisticated
9 scheme using third-party debit cards and ATM machines. But the
10 defining characteristics, the hallmarks of the fraud remained
11 the same: He stole the identities of our society's most
12 vulnerable members. He created fake W-2 forms using the
13 companies he looked up at FEIN Search. And he tried to dress
14 up the receipt of the money by hiding first behind a fake
15 business's bank account and then fake payroll cards for fake
16 employees at a fake company. And then once he got the money,
17 he spent it in cash.

18 Ladies and gentlemen, there are a lot of pieces to put
19 together here to form one picture, but when you consider all
20 those pieces, when you look at the full picture, you will
21 know -- you already do know -- that Messiah Clark is guilty of
22 all the charges in this case. Thank you.

23 THE COURT: Mr. Yannella?

24 MR. YANNELLA: Yes, your Honor.

25 Good morning. We first met on Tuesday morning. It

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Summation - Mr. Yannella

1 has been a long three days. We all worked very hard, whether
2 we were talking, or whether you were sitting there trying to
3 pay attention to all of this evidence. We didn't have many
4 breaks; we worked from early in the morning to late in the
5 afternoon.

6 There is one thing I think I can agree with the
7 government on here, and it's that we all owe you a debt of
8 gratitude for sitting through this and trying to pay attention.
9 We pulled you away from your families and your professional
10 lives. It hasn't been an easy task, but it's not supposed to
11 be an easy task. What you are doing here is very serious. You
12 are being asked to pass judgment on, to render a verdict
13 against an individual who is charged with very serious crimes.

14 So, we thank you for the effort you have made so far,
15 but it is an effort that really hasn't begun in earnest yet,
16 because soon the case will be yours, and that's when the
17 responsibility really shifts to you.

18 On Tuesday, when I made my opening statement, I said I
19 would only be here defending Mr. Clark for the charges in the
20 indictment. Now, Mr. Clark and I do not have to defend his
21 lifestyle, we do not have to defend the type of cars he may
22 have driven, we only have to defend the nine charges in the
23 indictment. He pleaded not guilty to those charges, and that's
24 all we intend to defend.

25 Now, there is going to come a point when the lawyers

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Summation - Mr. Yannella

1 here after making our closing arguments will sit down, and that
2 will be a moment where your job will begin. At that point
3 Judge Daniels will instruct you on the law, but you are the
4 exclusive judges of the facts. It is your province, your
5 responsibility, to make a fair and responsible judgment of what
6 the facts are in the case.

7 The other side of the coin is that Judge Daniels is
8 the one who is going to give you the law. Once you have that
9 law, you will be the ones who will apply the law exclusively to
10 the facts as you determine them.

11 Now, keep in mind there are multiple counts in the
12 indictment, and you are going to have to return a different
13 verdict for each and every count. You are going to have to
14 pass judgment, guilty or not guilty, separately on each count.

15 Now, what occurred here? I will submit to you that
16 what the government proved is that a fraud did occur, but they
17 haven't proved that Messiah Clark is the individual who
18 committed that fraud.

19 Now, I think you heard from 11 of the victims, and
20 it's obvious to everybody here that the people who testified
21 did not authorize anybody to file tax returns on their behalf,
22 and they did not obtain the refunds or the benefits. I think
23 only 11 of them testified. We didn't hear from the vast
24 majority, so we can't say for sure with respect to those
25 people. This is another case where the government is asking

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Summation - Mr. Yannella

1 you to assume that the other victims would have been similar to
2 the 11 who testified here.

3 But what don't we have? Nobody -- nobody -- came in
4 here and testified that they saw Messiah Clark file a tax
5 return, whether fraudulent or not. Nobody saw Messiah Clark
6 create a W-2, the employer's statement of wages, whether
7 fraudulent or not. Nobody came in here and testified that they
8 saw Messiah Clark steal a Social Security number, obtain a list
9 of names or dates of birth. Nobody came in here to testify
10 that they saw Messiah Clark access the database at the New York
11 City Health and Hospitals Corporation of the patients. And
12 that list would have contained names and dates of birth.

13 No cooperators testified. So often you have other
14 people involved in the crime who get up on the witness stand
15 and say, yes, I did it with Messiah Clark, or I did it with
16 whoever is on trial. That didn't happen here.

17 No one said they saw him going to ATMs. No one said
18 he tried to bribe them. No one said he tried to buy a list of
19 names or dates of birth. No one said they saw him filling out
20 tax returns.

21 There is no undercover work here. The government
22 doesn't send an undercover officer back in 2008, when they have
23 77 returns filed using the address of 2018 Story Avenue. Some
24 of those refunds are paid, some are not. At that point does an
25 undercover go to 2018 Story Avenue back in 2008? Do some

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Summation - Mr. Yannella

1 investigation? See who's there? See who's committing this
2 fraud? Try to gain evidence? Try and wear a wire? Take some
3 photographs, surveillance photographs back then? No, it
4 doesn't occur.

5 Now, another type of evidence we have: There is no
6 ledger seized from Messiah Clark. We know from Special Agent
7 Barbara Renken, who was present there for the arrest, that they
8 went to his home, he was there with his wife very early in the
9 morning, they arrested him in May of 2013. But they don't
10 seize any proof. Nothing is seized from his car. No blank
11 returns are seized. No copies of filled-out returns are
12 seized. No ledgers, no names. The evidence here is
13 insufficient to prove that he is the one who committed this
14 crime.

15 Now, of course, as you heard from the prosecutor,
16 Judge Daniels is the one who is going to instruct you on the
17 law, but there is one thing that all of these counts have in
18 common: They have to prove that Messiah Clark knowingly --
19 that he is the one who committed the crime. Whether it's
20 making false claims, they are going to have to present evidence
21 and prove beyond a reasonable doubt that he is the one who made
22 or presented the claim. For the theft of government funds,
23 they are going to have to prove that he is the one who stole
24 the property. And for the identity theft, they are going to
25 have to prove that Messiah Clark is the individual who

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Summation - Mr. Yannella

1 transferred, possessed or used a means of identification.

2 Now, let's go through some of the evidence.

3 Mr. Crowley testified from the IRS. And the IRS's failures
4 were on display here, shockingly on display. They receive
5 returns, and they send a check out in about two weeks, two to
6 four weeks, sometimes sooner, without verifying that the W-2
7 information for the employer is accurate. They don't verify
8 that the address that they're sending the refund to is
9 accurate. They don't verify that the bank account, or the
10 account number, or the routing number is accurate if they're
11 going to be sending out the refund electronically as opposed to
12 by mail. They don't verify the IP address. And they don't do
13 anything to shut this fraud down in 2008, 2011, 2012. It's not
14 until May of 2013 that an arrest of Messiah Clark finally
15 occurs.

16 Mr. Crowley testified that there are two types of
17 returns: Paper and electronic. If it's paper, it's just
18 mailed in. If it's electronic, it's either made by a preparer
19 who has access to electronically filing returns with the IRS,
20 or through some type of commercial software.

21 When a person files a return electronically -- and you
22 heard this from Mr. Crowley -- the person makes up the PIN
23 number. There is no way of knowing whether any other people
24 use that PIN number. So, when a PIN number is used, and the
25 same PIN number is used on more than one return, we don't know

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Summation - Mr. Yannella

1 if one person filed all of those returns; we don't know if
2 multiple people did it. There is no way of proving who
3 actually filed the returns. You have an IP address, but the
4 IRS can't track who is filing the return just because there is
5 an IP address. They can just tell that the return came from
6 some IP address. There could be any computer or device
7 connected.

8 We heard from some of the victims: Juana Cardona,
9 Carmen Lajara, Jessica Rivera. I think these are all elderly
10 people. Your verdict can't be based on sympathy for them; it
11 can't be based on feeling sorry for them; it can't be based on
12 a notion that someone took advantage of them. Now, none of
13 those individuals ever went to Kohler Goldwater, and although
14 some of these people had returns filed in their names
15 unbeknownst to them as far as back as 2008, nobody contacted
16 them until 2014. One common question for every witness was
17 when were you first contacted? Two weeks ago. One week ago.

18 Now, the government wants you to infer or to assume
19 that Messiah Clark's employment at the New York City Health and
20 Hospitals Corporation is proof that he somehow had access to
21 Social Security numbers, dates of birth or identities, the fact
22 that he was once employed there for 11 years.

23 Now, there is no proof of when these names, dates of
24 birth, Social Security numbers were compromised. There is no
25 proof of when they were stolen. There is no proof of where it

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Summation - Mr. Yannella

1 occurred. For example, we had a victim named Santiago,
2 Mr. Santiago, who lost his wallet back in 2011 with his Social
3 Security number. He reported it to the police. I asked him
4 when were you first contacted. In 2014, September of 2014.

5 There is no proof that Kohler Goldwater Hospital is
6 where the databases were compromised. Listen to the list of
7 hospitals. I am not going to read that entire list again, but
8 you heard all 22 read off, and it took over a minute, almost a
9 couple of minutes to read that. Now, the people -- as the
10 government has shown you through 11 of the victims -- did tend
11 to be either elderly or disabled in some way, but under those
12 circumstances is it any surprise whatsoever that they were once
13 patients at the New York City Health and Hospitals Corporation?
14 If you're elderly, if you are disabled, if you have medical
15 problems, then certainly it's not surprising that you'd go to
16 the New York City hospitals. It's probably about the same
17 percentage of people who would ride the subway. So, there is
18 no really significant connection simply because Messiah Clark
19 worked for ten or 11 years at Kohler Goldwater Hospital.

20 They have brought evidence that Ms. Hooks had been The
21 Bridge. That doesn't prove anything. Again, it's assumptions
22 that that's somehow significant and ties her to Messiah Clark.

23 Now, what the prosecutor says is the evidence is not
24 what the evidence is necessarily. An example of that was you
25 heard the prosecutor today testify that 2018 Story Avenue is a

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Summation - Mr. Yannella

1 single-family dwelling, a single-family residence. Well, the
2 witnesses didn't testify to that. An investigator who took the
3 photograph of that address was asked by the prosecutor is it a
4 single-family dwelling, and she said you can't tell. So, what
5 the government says the evidence will be is not necessarily
6 what it is.

7 Another example of that is MSM. They're asking you to
8 speculate that those initials correspond to my client's family
9 members. They don't know that.

10 We had Mr. Minott testify from the New York City
11 Health and Hospitals Corporation. Now, the purpose of his
12 testimony was that he was given a list of people and asked if
13 they were patients at the hospital. And some of them were.
14 Now, the prosecutor said that he said the majority of those
15 people were from Kohler Goldwater. He didn't say that. That's
16 the prosecutor's argument, and that was the prosecutor's
17 question. He hadn't really compared it.

18 He also -- and this came out in cross-examination --
19 pointed out that many of these patients were seen at Lincoln,
20 Bellevue, Coney Island, Gouverneur, all types of hospitals.

21 Now, one significant thing about Mr. Minott's
22 testimony was that he said my client as a community assistant
23 would not have had access to the database of dates of birth and
24 Social Security numbers. He said that someone who drives
25 patients around from one building to the next or one hospital

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Summation - Mr. Yannella

1 to the next wouldn't need and wouldn't be given access to those
2 computers. It's not sufficient to prove that these identities
3 were compromised or that the database from New York City Health
4 and Hospitals was somehow compromised. They have to prove that
5 Messiah Clark was involved in that.

6 What do we know about his employment there from 1999
7 until 2010? We know from Mr. Kritz, who is from the human
8 resources department, that he worked there for 11 years. There
9 were no records of any complaints. 11 years he worked there;
10 no performance concerns whatsoever. 179-page file, no
11 performance concerns whatsoever.

12 Mr. Kritz also testified that -- now he is the human
13 resources person. They are trying to prove that he accessed
14 the Social Security numbers and dates of birth. He had no
15 information whatsoever about whether Messiah Clark would have
16 been given a user name and a password for those computers.

17 Now, we already know from the other witness that a
18 person at his level wouldn't have that. And the director of
19 human resources had no information whatsoever tending to
20 suggest that my client had a user name or password to access
21 the database.

22 Mr. Stubbs, a very important witness who was from Time
23 Warner Cable, and he was the director of security. Well, he is
24 the one who talked about modems and IP addresses. He told us
25 that just because you have an IP address, the IP address is

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Summation - Mr. Yannella

1 assigned to the modem that Time Warner Cable or Comcast or
2 Verizon puts into your home. It's only assigned to that main
3 device that's in your home. There could be all types of
4 devices that connect to it: It could be your smart phone in
5 your pocket, it would be a computer, it could be a tablet, it
6 could be someone in your house, it could be the downstairs
7 neighbor, it could be the upstairs neighbor, it could be the
8 nextdoor neighbor.

9 Now, you saw pictures of these residences. This is
10 not somewhere out in the suburbs where homes are far from each
11 other. All the homes are packed together. Mr. Stubbs
12 testified that the fire wall could be turned or off. You can't
13 tell if one person or multiple people are accessing the router.
14 If you share the user name and password of the router one time,
15 then anyone in the future can use that same user name and
16 password to access it again.

17 Mr. Lahiri testified. He was from the FEIN Search
18 company. It's a four person company with over 500,000
19 customers, and they are the ones who troll the databases of
20 local, state and federal agencies looking for Social Security
21 numbers or EIN numbers to post on the Internet for a fee. This
22 witness couldn't answer a simple question. When I asked him if
23 he could verify whether or not his subscribers shared their
24 user name and password, he couldn't answer the question. He
25 kept on saying, well, the subscriber agreement prohibits from

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Summation - Mr. Yannella

1 doing that. OK, fine, the agreement says that. But did your
2 500,000 customers comply with that? He wouldn't answer a
3 simple question. And I think that suggests he was concerned
4 about protecting the integrity of his own business. He says
5 this is a business-to-business service. He doesn't know who
6 his customers are; he doesn't know verification. As long as he
7 gets a bank account document, or a certificate of
8 incorporation, he is willing to sell these very important
9 numbers on the Internet for a fee.

10 So, I would suggest to you that he is a man who has
11 something to hide, or is concerned about the integrity of his
12 business, a man who does zero background check on the people he
13 is selling this information to. He admitted that he didn't
14 know if one of his four employees, Juliann, spoke to a male or
15 female. The notes gave no indication of who she had spoken to.
16 But then he changed his testimony and said his notes contained
17 things that were not in the written notes. He didn't know the
18 password for the FEIN Search customer, because the customer
19 assigns the password. He didn't know how many people had used
20 that password and those log-in credentials. He didn't know if
21 it was one person, multiple people, if it was shared. And he
22 had no interaction whatsoever with Messiah Clark.

23 We had a witness from Bank of America, Dulce
24 Marroquin. Through her they put up the photograph from October
25 20, 2011. It was a picture at a bank branch. It's Messiah

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Summation - Mr. Yannella

1 Clark at a bank branch. Is it a crime to go to a bank branch
2 to do a cash transaction? No, it is not, not unless you are
3 doing some other type of crime with it. Messiah Clark on that
4 day did not wear a hat, he did not wear sunglasses, he didn't
5 send someone else to do the transaction for him. There was
6 nothing criminal there.

7 We had two witnesses who testified from the card
8 companies: Theresa Garrido from TFG Card Solutions, and
9 Mr. Tchiakpe from Motivano. They both testified that they are
10 companies that offer cards which you can use to pay your
11 employees who don't have bank accounts. But once they mail
12 those cards out, they have no idea what happened to them. They
13 don't know who received the cards. They don't know if the
14 cards reached their intended destination. They don't know what
15 happened to the cards once they were there, who they
16 distributed them to, who activated the cards. They don't keep
17 track of where the money is sent. Well, how could you track
18 that?

19 Well, could we put Government Exhibit 817 on the
20 board, please. Thank you.

21 This is a Chase Bank machine from Newburgh, New York;
22 it's Government Exhibit 817. It's up on the board. And what
23 does it have? If you look at it, in the upper right-hand
24 corner there is a camera which takes a picture of the person
25 who is accessing the ATM machine. Now, you know the timing of

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Summation - Mr. Yannella

1 the arrest. We heard it through Special Agent Barbara Renken
2 that my client was arrested in May of 2013. Now, that's only
3 two months after these records we have of people going into
4 these very ATM machines. There is another one. There was one
5 from a Citizens Bank, it's Government Exhibit 814. We don't
6 need to put that on the board. I think there is yet a third
7 one. All the ATMs have cameras.

8 Well, Kevin Song -- who I believe is an investigator
9 from the U.S. Attorney's office -- did he go up there back in
10 May of 2013 and get the pictures from the bank of who had just
11 accessed the ATM machines in connection with this case? No.
12 When was he asked to go up there? Two weeks ago. Once he went
13 up there he spent a lot of time taking pictures, doing Google
14 maps, showing what is in proximity to what. Did he go into one
15 bank and say, hey, I've got this big stack of transactions on a
16 stack of paper; can you give me pictures from your ATM
17 machines? Can you tell me whether you have pictures of Messiah
18 Clark going up there with these cards? He didn't even ask the
19 banks for the pictures. They have pictures of license plates
20 of cars that go through drive-through tellers.

21 Now, I'm close to sitting down here, but I just want
22 to remind you at the end of the case, the time is coming when
23 the case is going to be yours to make these very important
24 decisions. Now, this is a criminal case, it's not a civil
25 case. This is not about money, it's not some kind of civil

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Summation - Mr. Yannella

1 case. This is a criminal case, so it's different from those
2 civil cases.

3 In a criminal case we have constitutional rights
4 involved. Messiah Clark has a constitutional right to remain
5 silent, and Judge Daniels is going to tell you that you can't
6 infer anything from the fact that he didn't testify.

7 In a criminal case, under our United States
8 Constitution the proof and the burden of proof is on the
9 prosecutors, and that burden is proved beyond a reasonable
10 doubt. So this is not a 50/50 thing, if there is smoke then
11 there must be fire, if we think maybe he did it, then we can
12 say guilty. They have to prove beyond a reasonable doubt all
13 the elements of the crimes.

14 Now, we have three different time periods here. We
15 have something back in 2008 approximately, around 2011 and into
16 2013. There are three different time periods. For each
17 different time period there are three different counts:
18 Identity theft, theft of funds and making false claims. You
19 have to judge each of those individually.

20 Messiah Clark didn't have any burden when we walked in
21 here on Tuesday morning to prove that he is innocent, and we
22 haven't attempted to do that. If I had to prove that he was
23 innocent, this would have been a different type of trial, but
24 under our criminal system those are the rules. We are entitled
25 to rely on you to accept the rules and the law as Judge Daniels

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Summation - Mr. Yannella

1 gives it to you more fully quite soon.

2 After you get the case, you are going to go in the
3 back; you are going to start talking to each other; you are
4 going to each individually have your own opinion of what the
5 evidence is. Now, sometimes when you talk to other people you
6 are assuming everyone else is going to see it your way. If
7 other people don't see it your way, then talk to them, discuss
8 it with them, exchange ideas, tell them why you see it one way
9 and ask why they see it a different way.

10 But one thing I would urge you is if you have a strong
11 judgment in your own heart and in your mind that the government
12 did not prove the case beyond a reasonable doubt, if other
13 jurors can convince you otherwise, then change your verdict.
14 But don't compromise your verdict just to be in agreement with
15 other people.

16 If it turns out one way or the other that you are in
17 the minority, don't surrender your opinion just to get out of
18 the unpleasant duty of being a juror and sticking up for what
19 your opinion is.

20 So, be courteous tour fellow jurors, listen to them,
21 discuss it with them, but whatever your verdict is in your
22 heart and mind, stick with it.

23 And I am going to ask you to return the only verdict
24 that is justified under these circumstances, which is not
25 guilty. Thank you.

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Summation - Mr. Yannella

1 THE COURT: Ms. Cucinella?

2 MS. CUCINELLA: Your Honor, we have a brief rebuttal,
3 but may we have just a five minute break beforehand?

4 THE COURT: Sure.

5 Ladies and gentlemen, I am going to give you a ten
6 minute break. Don't discuss the case. Keep an open mind until
7 I finally give the case to you. Why don't you be back in the
8 jury room in ten minutes and we will continue.

9 (Jury not present)

10 THE COURT: OK, take ten minutes.

11 MS. CUCINELLA: Thank you.

12 (Recess)

13 THE COURT: One quick thing before they come in. You
14 know, I can't in good conscience keep these four jurors around.
15 This is not a case that -- given the length of the case and the
16 nature of the case, I just don't think it's fair to make them
17 stick around. I would rather take my chances, as they say.
18 And as opposed to some other case where we have been on trial
19 for three months or something, maybe there would be a danger,
20 but I have never had a problem, and I don't anticipate we will
21 have a problem here.

22 MS. GARNETT: I understand your decision, Judge.

23 THE COURT: Let's hope I'm proven right.

24 MS. GARNETT: I hope so too.

25 (Jury present)

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Rebuttal - Ms. Cucinella

1 THE COURT: Ms. Cucinella.

2 MS. CUCINELLA: This is not a whodunnit. It's not an
3 Agatha Christie novel. We do not need Sherlock Holmes or Nancy
4 Drew to get to the bottom of what happened here. There is no
5 real mystery about who filed these tax returns or who stole
6 this money.

7 I'm not going to be able to respond to all of
8 Mr. Yannella's points, and quite frankly I don't want to waste
9 your time. I know that you are eager to get to the case and to
10 start deliberating. I am just going to respond to a few of the
11 most important points and then rely on all of you and the close
12 attention that I know you have been paying throughout this
13 trial. There are some cases that are close; this is not one of
14 them.

15 Now, I want to be absolutely clear that the defendant
16 doesn't have to say or do anything at this trial, but when
17 defense counsel chooses to address you and to make arguments
18 through jury addresses and the cross-examination of witnesses,
19 you can and should examine those arguments with the critical
20 eye just like you would any other aspect of this case.

21 It has been suggested that you should have some doubt
22 about whether it was Messiah Clark who committed this crime
23 because there is no surveillance footage from the banks where
24 he accessed the ATMs, and no cooperating witness, no
25 cooperating witness who testified that he helped Mr. Clark

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Rebuttal - Ms. Cucinella

1 commit these crimes. We of course showed you the picture of
2 the defendant in the Parkchester Bank of America in 2011. I
3 talked about it in my closing. Do you remember that? Where
4 the defendant was depositing \$5,000 in cash at a bank counter
5 at 10:36 in the morning. But it's true, that's the only actual
6 picture that we have of the defendant committing the crime. Do
7 we wish we had more pictures? Of course. Do you need them in
8 order to find Mr. Clark guilty as charged? Of course not.

9 Imagine you are at work and you have put your lunch, a
10 peanut butter and jelly sandwich, in the refrigerator in the
11 kitchen. You go back to the desk and you can see the door to
12 the kitchen, not inside, just the door. If you saw a man walk
13 into the kitchen, stay in the kitchen for five minutes and then
14 walk out with peanut butter and jelly all over his face, peanut
15 butter breath and a jelly stain on his shirt, and your sandwich
16 is gone, would you need a camera to tell you who ate your
17 sandwich? No. Do you need a cooperator, someone who held the
18 door to the refrigerator open, or watched look-out, to testify
19 and tell you who ate your sandwich? No. You know exactly who
20 ate your sandwich. It was the man with the peanut butter all
21 over his face. Even without a picture, there is no doubt, and
22 that's because everything adds up, everything makes sense.

23 Who is the man with the peanut butter all over his
24 face here? Messiah Clark, the man with the Bentley, with the
25 Range Rover, the homes, the cash, the fake business, the FEIN

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Rebuttal - Ms. Cucinella

1 Searches. Everything Messiah Clark did, all the steps that he
2 took, they all add up, and they tell you exactly what you need
3 to know: That Messiah Clark is guilty of this crime.

4 We don't have to show you that Messiah Clark is the
5 one who stole those patient identities from New York City
6 Health and Hospitals Corporation. As Judge Daniels will tell
7 you, to prove that Messiah Clark is guilty of the three counts
8 of identity theft, what we have to prove is that Messiah Clark
9 possessed or used those identities, names, or Social Security
10 numbers, or birth dates, in connection with the theft of
11 government funds. And you know that the proof is overwhelming
12 that Messiah Clark did that again and again and again.

13 There has also been some suggestion that because
14 Mr. Clark's crimes weren't discovered earlier, because the IRS
15 doesn't take some steps to verify the identities on those
16 returns, and because Messiah Clark seemed to have gotten away
17 with the scheme for a few years, that it's not a real crime.
18 That too is a ridiculous argument.

19 Suppose you go into a bodega and the store owner isn't
20 there, she has gone in back for whatever reason, but her brand
21 new iPhone is sitting on the counter. Someone can't come in
22 and take it along with some candy and some lottery tickets
23 simply because the owner wasn't watching. Was it a good idea
24 for her to go in back and leave her iPhone out and her store
25 unattended? No, it wasn't very smart. But it doesn't make it

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Rebuttal - Ms. Cucinella

1 any less criminal for someone to steal that iPhone or to take
2 that merchandise.

3 You are still guilty even if no one is looking. If
4 you stole the merchandise, you are guilty, no matter that you
5 didn't get caught at the time. Did Messiah Clark get caught
6 right away? Obviously not. Would it have been better if the
7 IRS had caught Messiah Clark earlier? Of course. Does it make
8 him any less guilty? Of course not. He knew he was getting
9 away with it. It's why he kept changing the scheme. He was
10 refining, switching from TFG to Motivano, changing the EINs he
11 was using, buying the bulk package from FEIN Search. He was
12 getting better at it. Thankfully IRS did catch up with him.

13 It has also been suggested that you should seriously
14 consider the fact that we don't know whether Clark's Internet
15 access at 1604 Hawthorn Way was protected, that you can't
16 possibly know whether someone hacked into his wireless access
17 and filed those tax returns. Ladies and gentlemen, this is
18 absurd. Let's look at what that argument actually suggests,
19 what you would have to believe in order for that theory to even
20 be possible.

21 You'd have to believe that a person essentially hiding
22 in the bushes outside of Messiah Clark's brand new condo was
23 hacking into his Internet and filing tax returns, and not only
24 did that individual manage to find Messiah Clark's unprotected
25 wireless network at his home in New Windsor, he followed him

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Rebuttal - Ms. Cucinella

1 there from the Bronx, because that's where that person had
2 filed all those tax returns in 2008 and 2011. Perhaps he had
3 been hiding in the giant carport out in front of 2018 Story
4 Avenue, or under the Bentley that was likely parked in that
5 carport.

6 You know that this is absurd. You know that there was
7 no man in the bushes and that it wasn't his upstairs neighbor
8 or his downstairs neighbor. It was Messiah Clark that filed
9 those tax returns. There is not a shred of evidence in this
10 record to suggest that it was anyone other than Messiah Clark.
11 Messiah Clark stole those identities, and he used them to file
12 false tax returns, and he pocketed the money.

13 There has also been some suggestion that this is a
14 victimless crime, that nobody cares if this money went missing,
15 no harm, no foul. Don't let the defendant get away with that.
16 It is wrong, and you must reject it. Messiah Clark stole half
17 a million dollars, and he tried to steal over double that from
18 the United States Treasury. That's money that belongs to every
19 American. It's not Messiah Clark's for the taking.

20 And, ladies and gentlemen, I submit to you that it is
21 unfair and inaccurate to claim that the individuals whose
22 identities were stolen were not in some way affected by this
23 crime. You met a small subset of those victims. Again, you
24 saw right in front of you in this courtroom what those
25 individuals have in common. Many of them are fragile; they

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Rebuttal - Ms. Cucinella

1 don't have the capacity that they once had to protect
2 themselves. The vast majority of the victims were patients at
3 hospitals, making little to no income. All of them were
4 vulnerable. And Messiah Clark took their names, he used them,
5 he profited from them. I don't think that if you ask Glenn
6 Womack how he felt about his name being used that he would say
7 it doesn't matter. It does matter, and it's not OK.

8 (Continued on next page)

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Ms. Cucinella - rebuttal

1 MS. CUCINELLA: Mr. Yannella argued that we only
2 called eleven victim witnesses. It is not our job to present
3 or call every possible witness. You know that in this case
4 that would mean hundreds of witnesses. Counting the victims
5 whose returns were filed and the people whose names were used
6 on those third-party debit cards, we'd all be here for weeks.
7 We'd be here as hundreds of elderly, sick or disabled witnesses
8 were being brought down to court.

9 But that's not what is required or what would be a
10 sensible use of our time. What is required is that we call
11 enough witnesses and put on enough proof to convince you beyond
12 a reasonable doubt that this defendant is guilty of the charges
13 in this case. And I submit to you that we have done that.

14 Now, finally, defense counsel has talked about
15 reasonable doubt and the questions in this case. Are there
16 unanswered questions here? Of course there are. Do those
17 questions matter? Not at all. I submit to you that if you
18 believe Messiah Clark stole Georgia Hooks' identity; if you
19 believe she never worked for MSM tax prep and accounting
20 services, and that it was Messiah Clark who filed that tax
21 return and pocketed that cash, that he is guilty of Counts One,
22 Two and Three of the indictment.

23 I submit to you that if you believe that Messiah Clark
24 took Glenn Womack's identity, that Mr. Womack never worked at
25 New York City Health and Hospitals Corporation; that Messiah

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Ms. Cucinella - rebuttal

1 Clark filed a false tax return in his name and stole that
2 money, that he is guilty of the crimes charged in Counts Four,
3 Five and Six of the indictment.

4 I submit to you that if you believe that Messiah Clark
5 stole Herminia Morales' name, lied about her working at Exxon
6 Mobil, filed a fraudulent tax return in her name and stole that
7 money, that he is guilty of Counts Seven, Eight and Nine.

8 Ladies and gentlemen, I'm about to sit down. On
9 behalf of the United States Attorney's Office, I'd like to
10 thank you for your willingness to serve on this jury, for the
11 seriousness with which you've undertaken this duty and for your
12 close attention throughout this trial.

13 Next you'll receive Judge Daniels' instructions on the
14 law and your most important work will begin. We trust that
15 when you've heard what the law is and you apply it to the
16 overwhelming evidence in this case, you will return the only
17 just and true verdict: That Messiah Clark is guilty of each
18 count in the indictment.®

19 THE COURT: Now, ladies and gentlemen, you're about to
20 enter your final duty, which is to decide the fact issues in
21 the case. Before you do that, I would instruct you on the law.
22 You must pay close attention to me now. I will go slowly as I
23 can and be as clear as possible.

24 Now, I told you at the start of the trial that your
25 principal function during the taking of testimony would be to

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1 listen carefully and observe each witness who testified. It
2 has been obvious to me and to counsel that you've faithfully
3 discharged this duty. It is evident that you have followed the
4 testimony with close attention. I ask you to give me that same
5 careful attention as I instruct you on the law.

6 Now, you've now heard all of the evidence in the case,
7 as well as the final arguments of the lawyers for the parties.
8 My duty at this point, as I said, is to instruct you as to the
9 law. It is your duty to accept these instructions of law and
10 apply them to the facts as you determine them, just as it's
11 been my duty to preside over the trial and decide what
12 testimony and evidence is relevant under the law for your
13 consideration. These legal matters, you must take the law as I
14 give it to you. If any attorney has stated a legal principle
15 different from any that I state to you in my instructions, it
16 is my instructions you must follow. You should not single out
17 any instruction as alone stating the law, but you should
18 consider my instructions as a whole when you retire to
19 deliberate in the jury room.

20 You should not, any of you, be concerned about the
21 wisdom of any rule that I state. Regardless of any opinion you
22 may have as to what the law may be or ought to be, it would
23 violate your sworn duty to base a verdict on any other view of
24 the law than that which I give you.

25 Now, your final role is to pass upon and decide the

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1 fact issues that are in the case. You, the members of the
2 jury, are the sole and exclusive judges of the facts. You pass
3 upon the weight of the evidence. You determine the credibility
4 of the witnesses. You resolve such conflicts as there may be
5 in the testimony, and you draw whatever reasonable inferences
6 you decide to draw from the facts as you have determined them.

7 Now, I shall later discuss with you how to pass upon
8 the credibility or believability of the witnesses.

9 In determining the facts you must rely upon your own
10 recollection of the evidence. Again, what the lawyers have
11 said in their opening statements and their closing arguments
12 and their objections or in their questions is not evidence. In
13 this connection you should bear in mind that, as I said, a
14 question put to a witness is not evidence. It is only the
15 answer to the question which is evidence. You may not consider
16 any answer that I directed you to disregard or that I had
17 directed struck from the record. Do not consider such answers.

18 Nor is anything I may have said during the trial or
19 may say to you during these instructions to be taken in
20 substitution for your own independent recollection of the
21 evidence. What I say is not evidence. Anything you may have
22 seen or heard about this case outside of this courtroom is not
23 evidence and must be entirely disregarded.

24 Now, the evidence before you consists of the answers
25 given by the witnesses, the sworn testimony they gave as you

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1 recall it and the exhibits that were received in evidence, plus
2 any stipulations of the parties. Again, a stipulation is an
3 agreement among the parties that a certain fact is true or
4 that, if a witness were called, the witness would give certain
5 testimony. You should regard such agreed-upon facts as true or
6 accept that the witness would have given such testimony.

7 Now, exhibits which have been marked for
8 identification but not received in evidence may not be
9 considered by you as evidence. Only those exhibits admitted
10 into evidence may be reviewed by you in the jury room.

11 Now, anything you may have seen or heard about this
12 case outside the courtroom is not evidence and must be totally
13 disregarded. Since you are the sole and exclusive judges of
14 the facts, I do not mean to indicate any opinion as to the
15 facts or to what your verdict should be. The rulings I have
16 made during the trial are not any indication of my views of
17 what your decision should be as to whether or not the guilt of
18 the defendant has been proven beyond a reasonable doubt. You
19 are expressly to understand that the Court has no opinion as to
20 the verdict you should render in this case.

21 As to the facts, ladies and gentlemen, again, you are
22 the exclusive judges. You are to perform the duty of finding
23 the facts without bias or prejudice to any party. You should
24 consider the evidence in light of your common sense and
25 experience and you may draw reasonable inferences from the

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1 evidence.

2 Now, again, at times a lawyer may have incorporated
3 into a question a statement which assumes certain facts to be
4 true and ask the witness if the statement was true. If the
5 witness denies the truth of a statement, and if there's no
6 evidence in the record proving that the assumed fact is true,
7 then you may not consider the fact to be true simply because it
8 was contained in the lawyer's question. For example, if a
9 witness was asked a question, "is your automobile red," you
10 would not be permitted to consider as true the assumed fact
11 that the witness owns an automobile, unless the witness
12 indicates that he or she does own an automobile or unless
13 there's some other evidence in the record that the witness owns
14 an automobile. In short, questions are not evidence. It is
15 the answer, coupled with the question, that constitutes
16 evidence.

17 Now, it is the duty of the attorney for each side of
18 the case to object when the other side offers testimony or
19 other evidence which the attorney believes is not properly
20 admissible. Counsel also have the right and duty to ask the
21 Court to make rulings of law and request conferences at the
22 side bar out of the hearing of the jury. All of those
23 questions of law must be decided by me, the Court. You should
24 not show any prejudice against an attorney or a party because
25 the party's attorney objected to the admissibility of evidence

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1 or asked for a conference out of the hearing of the jury or
2 asked the Court for a ruling on the law. As I already
3 indicated, my rulings on the admissibility of evidence do not
4 indicate any opinion about the weight or effect of such
5 evidence. You are the sole judges of the credibility of all
6 witnesses and the weight and effect of all evidence.

7 Now, in determining the facts, the jury is reminded
8 that before each member was accepted and sworn to act as a
9 juror, he or she was asked questions concerning competency,
10 qualifications, fairness and freedom from prejudice or bias.
11 On the faith of those answers, the juror was accepted by the
12 parties. Therefore, those answers are as binding on each of
13 the jurors now as they were then and should remain so until the
14 jury is discharged from consideration of this case.

15 Now, your verdict must be based solely upon the
16 evidence developed at trial or lack of evidence. It would be
17 improper for you to consider in reaching your decision whether
18 the government sustained its burden of proof any personal
19 feelings you may have about the defendant's race, religion,
20 national origin, sex or age. All persons are entitled to
21 presumption of innocence, and the government has the burden of
22 proof, as I will discuss in a moment. It would be equally
23 improper for you to allow any feelings you might have about the
24 nature of the crimes charged to interfere with your
25 decision-making process. To repeat, your verdict must be based

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1 exclusively upon the evidence or lack of evidence in the case.

2 Now, under your oath as jurors you're not to be swayed
3 by sympathy. You are to be guided solely by the evidence in
4 this case. And the crucial hardcore question that you must ask
5 yourselves as you sift through the evidence is: Has the
6 government proven the guilt of the defendant beyond a
7 reasonable doubt? That is for you alone to decide whether the
8 government has proven that the defendant is guilty of the
9 crimes charged solely on the basis of the evidence and subject
10 to the law as I charge you. It must be clear to you that once
11 you let fear or prejudice or bias or sympathy interfere with
12 your thinking, there's a risk that you will not arrive at a
13 true and just verdict.

14 Now, if you have a reasonable doubt as to the
15 defendant's guilt, you should not hesitate for any reason to
16 find a verdict of not guilty. But on the other hand, if you
17 should find that the government has met its burden of proving
18 the defendant's guilt beyond a reasonable doubt, you should not
19 hesitate because of sympathy or any other reason to render a
20 verdict of guilty.

21 And I again remind you, as I did when you were
22 originally questioned as potential jurors, that the question of
23 possible punishment of the defendant is of no concern to the
24 jury and should not in any sense enter into or influence your
25 deliberations. The duty to determine what is a reasonable

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1 sentence in any particular case rests exclusively upon the
2 Court. Your function is to weigh the evidence in the case and
3 to determine whether or not the defendant is guilty beyond a
4 reasonable doubt solely on the basis of such evidence. Under
5 your oath as jurors, you cannot allow consideration of the
6 possible punishment which may be imposed upon the defendant if
7 he is convicted to influence your verdict in any way or in any
8 sense enter into your deliberations.

9 Now, you are to perform the duty of finding the facts
10 without bias or prejudice to either side. You are to perform
11 your final duty in an attitude of complete fairness and
12 impartiality. The case is important to the United States
13 Attorney's Office and it is important to the defendant. And
14 the fact that the prosecution is brought in the name of the
15 United States of America entitles the government to no greater
16 consideration than that accorded to any other party to a
17 litigation. By the same token, it is entitled to no less
18 consideration. All parties, whether the government or
19 individuals, stand as equals at the bar of justice.

20 Now, there are two types of evidence which you may
21 properly use in deciding whether the defendant has been proven
22 guilty. One type of evidence is called direct evidence. Now,
23 direct evidence is where a witness testifies to what he or she
24 saw, heard or observed. Now, in other words, when a witness
25 testifies about what is known to him or her of his own or her

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1 own knowledge by virtue of his or her own senses, what he or
2 she sees, feels, touches or hears, that is called direct
3 evidence.

4 Circumstantial evidence is evidence which tends to
5 prove a disputed fact by proof of other facts. Now, there's a
6 simple example of circumstantial evidence which is often used
7 in this court. Assume that when you came into the courthouse
8 this morning the sun was shining and it was a nice day. Assume
9 that the courtroom blinds were drawn and you could not look
10 outside. As you were sitting here, someone walked in with an
11 umbrella, which was dripping wet, and someone else then walked
12 in with a raincoat that was also dripping wet.

13 Now, you cannot look outside of the courtroom and you
14 cannot see whether or not it's raining, so you have no direct
15 evidence of that fact. But on the combination of facts that I
16 have just given you, it would be reasonable or logical for you
17 to conclude that it had been raining. That is all there is to
18 circumstantial evidence. You infer on the basis of reason and
19 experience and common sense, from one or more established
20 facts, the existence or the nonexistence of some other fact.

21 Now, circumstantial evidence is of no less value than
22 direct evidence, for it is a general rule that the law makes no
23 distinction between direct and circumstantial evidence. It
24 simply requires that before convicting a defendant, the jury
25 must be satisfied of the defendant's guilt beyond a reasonable

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1 doubt, based on all of the evidence in the case.

2 Now, during a trial and during argument you may have
3 heard the attorneys or the court use the term inference, and in
4 their arguments the attorneys may have asked you to infer on
5 the basis of your reason, experience and common sense from one
6 or more established facts the existence of some other fact.
7 Now, an inference is not a suspicion or a guess. It's a
8 reasoned, logical decision to conclude that a disputed fact
9 exists on the basis of another fact, which you know exists.
10 There are times when different inferences may be drawn from
11 facts, whether proved by direct or circumstantial evidence.
12 The government asks you to draw one set of inferences while the
13 defense may ask you to draw another. It is for you and you
14 alone to decide what inferences you would draw.

15 Now, the process of drawing inferences from facts, as
16 I said, from facts in evidence, is not a matter of guesswork or
17 speculation. An inference is a deduction or conclusion which
18 you, the jury, are permitted to draw but not required to draw
19 from the facts which have been established by either direct or
20 circumstantial evidence. Now, in drawing inferences you should
21 exercise your common sense. So while you are considering the
22 evidence presented to you, you are permitted to draw from the
23 facts which you find to be proven such reasonable inferences as
24 would be justified in light of your experience.

25 Here again, let me remind you that, whether based upon

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1 direct or circumstantial evidence or upon the logical and
2 reasonable inferences drawn from such evidence, you must be
3 satisfied of the guilt of the defendant beyond a reasonable
4 doubt before you may convict.

5 Now, you heard evidence that during the trial, that
6 witnesses have discussed the facts of the case in their
7 testimony with the lawyers before the witnesses appeared in
8 court. Although you may consider that fact when you were
9 evaluating a witness' credibility, I should tell you that
10 there's nothing either unusual or improper about a witness
11 meeting lawyers before testifying so that the witness can be
12 aware of the subjects he or she will be questioned about, focus
13 on those subjects and have the opportunity to review relevant
14 exhibits before being questioned about them in court. Such
15 consultation helps conserve your time and the Court's time. In
16 fact, it would be unusual for a lawyer to call a witness
17 without such consultation. Again, the weight you give to the
18 fact or nature of the witness' preparation for his or her
19 testimony and what inferences you draw from such preparation on
20 that is completely within your discretion.

21 Now, among the exhibits received in evidence were
22 photographs. These photographs purport to depict various
23 locations or objects relevant to the issues in this case.
24 These photographs were received in evidence to assist you in
25 making your evaluation of the testimony relating to the

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1 locations, scenes or objects depicted therein. Now, you are
2 the sole judges of the accuracy of these photographs and you
3 are the sole judges of the weight to be given such photographs.

4 Now, the parties have presented exhibits in the form
5 of charts and summaries. I decided to omit some of these
6 charts and summaries in place of or together with the
7 underlying document that they represent in order to save time
8 and avoid unnecessary inconvenience. You should consider the
9 charts and summaries admitted into evidence as you would any
10 other evidence. You are the sole judges of the accuracy of
11 these charts and summaries, and you are the sole judges of the
12 weight to be given to such charts and summaries.

13 Now, you had the opportunity to observe all of the
14 witnesses. It is now your job to decide how believable each
15 witness was in his or her testimony. Now, you are the sole
16 judges of the credibility of each witness and of the importance
17 of his or her testimony. Now, it must be clear to you by now
18 that you're being called upon to resolve various factual issues
19 under the counts of the indictment. You will now have to
20 decide the factual issues, and an important part of that
21 decision will involve making judgments about the testimony of
22 the witnesses you have listened to and observed.

23 Now, in making these judgments you should carefully
24 scrutinize all of the testimony of each witness, the
25 circumstances under which each witness testified and any other

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1 matter in evidence which may help you to decide the truth and
2 importance of each witness' testimony.

3 Now, your decision whether or not to believe a witness
4 may depend on how that witness impressed you. Was the witness
5 candid, forthright, frank, or did the witness seem as if he or
6 she was hiding something, being evasive or suspect in some way?
7 How did the way the witness testified on direct examination
8 compare with the way the witness testified on
9 cross-examination? Was the witness consistent in his or her
10 testimony or did he or she contradict himself or herself? Did
11 the witness appear to know what he or she was talking about?
12 And did the witness strike you as someone who was trying to
13 report his or her knowledge accurately?

14 Now, you do not have to accept the testimony of any
15 witness, even one who has not been contradicted or impeached,
16 if you find a witness not to be credible. You also have to
17 decide which witnesses to believe and which facts are true. To
18 do this, you must look at all the evidence, drawing upon your
19 own common sense and personal experience.

20 Now, if a witness is shown knowingly to have testified
21 falsely concerning any material matter, you have a right to
22 mistrust such witness' testimony in other particulars, and you
23 may reject all of the testimony of that witness or give it such
24 credibility as you think it deserves. You may accept all, part
25 or none of the witness' testimony.

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1 Now, how much you choose to believe a witness may be
2 influenced by the witness' bias. Does the witness have a
3 relationship with the government or the defense which may
4 affect how he or she testified? Does the witness have some
5 incentive, loyalty or motive that might cause him or her to
6 shade the truth, or does the witness have some bias, prejudice
7 or hostility that may have caused the witness, consciously or
8 not, to give you something other than a completely accurate
9 account of the facts he or she testified to?

10 Now, even if a witness was impartial, you should
11 consider whether a witness had an opportunity to observe the
12 facts he or she testified about, and you should consider the
13 witness' ability to express himself or herself. Ask yourself
14 whether the witness' recollection of the facts stands up in
15 light of all other evidence. In other words, what you must try
16 to do in deciding the credibility is to size a person up in
17 light of his or her demeanor, the explanations given and in
18 light of all the other evidence in the case, just as you would
19 in any important matter where you were trying to decide if a
20 person was truthful, straightforward and accurate in his or her
21 recollection.

22 In deciding a question of credibility, remember that
23 you should use, again, your common sense, your good judgment
24 and your experience. And you've heard the testimony of law
25 enforcement officials. The fact that a witness may be employed

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1 as a law enforcement official does not make his or her
2 testimony necessarily deserving of more or less consideration
3 or greater or lesser weight than that of an ordinary witness.

4 At the same time, it's quite legitimate for defense
5 counsel to try to attack the credibility of a law enforcement
6 witness on the ground that the witness may be colored or that
7 the testimony may be colored by a personal or professional
8 interest in the outcome of the case. It is your decision,
9 after reviewing all the evidence, whether to accept the
10 testimony of the law enforcement witness and to give to that
11 testimony whatever weight, if any, you find it deserves.

12 During the trial and during argument you've heard
13 testimony of witnesses and argument by counsel that the
14 government did not utilize specific investigative techniques.
15 You may consider these facts in deciding whether the government
16 has met its burden of proof because, as I told you, you should
17 look to all of the evidence or lack of evidence in deciding
18 whether the defendant has been proven guilty. However, you
19 also are instructed that there's no legal requirement that the
20 government use any of these specific investigative techniques
21 to prove the case. Your concern, as I've said, is to determine
22 whether or not on the evidence or lack of evidence the
23 defendant's guilt has been proven beyond a reasonable doubt.

24 Now, defense counsel has referred to the absence from
25 the trial of persons who did not appear here to testify. I

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1 instruct you that each party had an equal opportunity or lack
2 of opportunity to call any of these witnesses. Therefore, you
3 should not draw any inferences or reach any conclusions as to
4 what they would have testified to, had they been called. You
5 should, however, remember my instruction is that the law does
6 not impose on a defendant in a criminal case the burden or duty
7 of calling any witnesses or producing any evidence. The burden
8 is at all times upon the government to prove the defendant's
9 guilt beyond a reasonable doubt, and that burden never shifts
10 to the defendant.

11 Now, the defendant has pled not guilty to the
12 indictment. As a result of the defendant's plea of not guilty,
13 the burden is on the prosecution to prove guilt beyond a
14 reasonable doubt. Again, this burden never shifts to the
15 defendant for the simple reason that the law never requires or
16 never imposes upon the defendant in a criminal case the burden
17 or duty of calling any witnesses or presenting any evidence.
18 The law presumes the defendant to be innocent of all charges
19 against him. I, therefore, instruct you that the defendant is
20 to be presumed by you to be innocent throughout your
21 deliberations until such time, if ever, you as a jury are
22 satisfied that the government has proven him guilty beyond a
23 reasonable doubt.

24 Now, the defendant begins a trial here with a clean
25 slate. This presumption of innocence alone is sufficient to

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1 acquit the defendant, unless you as jurors are unanimously
2 convinced beyond a reasonable doubt of the defendant's guilt
3 after careful and impartial consideration of all the evidence
4 in the case. If the government does not sustain its burden,
5 you must find the defendant not guilty. And this presumption
6 of innocence was with the defendant when the trial began and
7 remains with him, as I say, even now as I speak to you, and
8 will continue with the defendant into your deliberations unless
9 and until you are convinced that the government has proved the
10 defendant's guilt beyond a reasonable doubt.

11 Now, the defendant, Messiah Clark, did not testify in
12 this case. Under our Constitution he has no obligation to
13 testify or to present any other evidence, as I said, because it
14 is the prosecution's burden to prove a defendant's guilt beyond
15 a reasonable doubt. That burden remains with the prosecution
16 throughout the entire trial, and as I said, never shifts to the
17 defendant. No defendant is required to prove that he is
18 innocent. You may not attach any significance to the fact that
19 the defendant did not testify. No adverse inference against
20 him may be drawn by you because he did not take the witness
21 stand. You may not consider this against him in any way in
22 your deliberations or in the jury room.

23 Now, I've said that the government must prove the
24 defendant's guilt beyond a reasonable doubt. The question
25 naturally is, what is a reasonable doubt? It is a doubt based

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1 upon reason and common sense. It is a doubt that a reasonable
2 person has after carefully weighing all of the evidence. It is
3 a doubt which would cause a reasonable person to hesitate, to
4 act in a matter of importance in his or her personal life.
5 Proof beyond a reasonable doubt must, therefore, be proof of
6 such a convincing character that a reasonable person would not
7 hesitate to rely and act upon it in the most important of his
8 or her own affairs. A reasonable doubt is not a caprice or a
9 whim. It's not a speculation. It is not an excuse to avoid
10 the performance of an unpleasant duty. And it is not sympathy.

11 In a criminal case, as I said, the burden is at all
12 times upon the government to prove guilt beyond a reasonable
13 doubt. The law does not require the government to prove guilt
14 beyond all possible doubt. Proof beyond a reasonable doubt is
15 sufficient to convict. And, again, this burden never shifts to
16 the defendant, which means that it is always the government's
17 burden to prove each of the elements of the crimes charged
18 beyond a reasonable doubt.

19 Now, if, after fair and impartial consideration of all
20 of the evidence, you have a reasonable doubt, it is your duty
21 to acquit the defendant. On the other hand, if after fair and
22 impartial consideration of all of the evidence you are
23 satisfied of the defendant's guilt beyond a reasonable doubt,
24 you should vote to convict.

25 Now, with regard to the crimes charged in the

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1 indictment, I should draw your attention to the fact that it
2 does not matter if the indictment charges that a specific act
3 occurred on or about a certain date and the evidence indicates,
4 in fact, that it was on another date. The law only requires a
5 substantial similarity between the dates alleged in the
6 indictment and the date established by testimony or exhibits.

7 Now, with these preliminary instructions in mind,
8 let's turn to the charges against the defendant as contained in
9 the indictment. I remind you that an indictment itself is not
10 evidence. It merely describes the charges made against the
11 defendant. It is an accusation. It may not be considered by
12 you as any evidence of the defendant's guilt. The defendant is
13 not charged with any crimes, other than the offenses alleged
14 against him in the indictment. The only question you must
15 answer is whether the government has proved beyond a reasonable
16 doubt the defendant committed the crimes charged. In reaching
17 your determination of whether the government has proved that
18 the defendant is guilty of the crimes charged beyond a
19 reasonable doubt, you may consider only the evidence introduced
20 at trial or lack of evidence.

21 Now, the indictment charges the defendant with three
22 counts of defrauding the government with respect to claims,
23 three counts of theft of government funds and three counts of
24 what's called aggravated identity theft.

25 Now, Counts One, Four and Seven in the indictment

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1 charge the defendant with defrauding the government with
2 respect to claims; specifically, during certain periods of time
3 by filing fraudulent income tax returns. Now, the criminal
4 statute provides in relevant part, whoever makes or presents to
5 any department or agency of the United States any claim upon or
6 against the United States or any department or agency thereof,
7 knowing such claim to be false, fictitious or fraudulent, shall
8 be guilty of a crime.

9 Now, the objective of Congress in enacting this
10 section was to assure the integrity of claims and vouchers
11 submitted to the government and thereby protect the funds and
12 property of the government from fraudulent claims, regardless
13 of the particular form of the claim or the particular function
14 of the government, department or agency against which the claim
15 is made. Congress intended to prevent any deception that would
16 impair, obstruct or defeat the lawful authorized function of
17 government departments or agencies.

18 Now, in order to prove the crime of making a false
19 claim, the government must establish each of the following
20 elements beyond a reasonable doubt: First, that on or about
21 the dates alleged, the defendant knowingly made or presented a
22 claim to the Internal Revenue Service, a department or agency
23 of the United States; second, that the claim was made or
24 presented -- the claim which was made or presented was a claim
25 against the United States or department or agency of the United

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1 States; and third, that the defendant presented the claim
2 knowing that it was false, fictitious or fraudulent as to a
3 material fact. I'll now explain each of these three elements
4 of this offense in more detail.

5 Now, the first element that I just described, which
6 the government must establish beyond a reasonable doubt, is
7 that the defendant knowingly made or presented a claim to the
8 IRS, a department or agency of the United States. Now, a claim
9 is a demand for money. It is presented when a fraudulent tax
10 return is signed and filed, as well as when a refund is
11 obtained.

12 Now, the second element the government must prove
13 beyond a reasonable doubt is that the claim was made or
14 presented against the United States or a department or agency
15 of the United States. If you find that the claim received by
16 an agency or department of the United States was one which the
17 agency or department was expected to pay, then this element of
18 the offense is satisfied.

19 And three, the third element the government must prove
20 beyond a reasonable doubt is that the claim was false,
21 fictitious or fraudulent as to a material fact. A claim is
22 false if it was untrue when made and was then known to be
23 untrue by the person making it or causing it to be made. A
24 claim is fictitious when it is not real or if it does not
25 correspond to what actually happened and the person making it

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1 or causing it to be made knew that it was not real at the time
2 it was made. A claim is fraudulent if it was falsely made or
3 caused to be made with the intent to defraud.

4 A material fact is one which has a natural tendency to
5 influence or is capable of affecting or influencing a
6 government function. That is, it must relate to an important
7 fact as distinguished from some unimportant or trivial detail.

8 An act is done knowingly if it is done voluntarily and
9 purposefully and not done by accident, mistake, carelessness or
10 other innocent reason. However, the government does not have
11 to prove that the defendant knew the relevant criminal
12 provisions governing his conduct, as long as it proves that the
13 defendant knew that the claim was false or fictitious. And
14 there's also no need for the prosecution to prove that the
15 government relied on the false claim.

16 To act with intent to defraud means to act knowingly
17 and with the specific intent to deceive, for the purpose of
18 causing some financial or property loss to the United States.
19 Again, it's not necessary that the government prove that each
20 of these entries were false, fictitious or fraudulent, so long
21 as you unanimously find that one of them was false, fictitious
22 or fraudulent.

23 Now, Counts Two, Five and Eight of the indictment each
24 charge the defendant with theft of federal funds for certain
25 time periods, three different time periods.

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1 Now, the criminal statute provides in relevant part,
2 whoever embezzles, steals, purloins or knowingly converts to
3 his use or the use of another any money or thing of value of
4 the United States or of any department or agency thereof shall
5 be guilty of a crime.

6 Now, in order to prove the defendant guilty of
7 stealing money or property belonging to the United States
8 government, the government must prove each of the following
9 elements beyond a reasonable doubt: First, that the money or
10 property described in the indictment belonged to the United
11 States government; second, that the defendant stole that
12 property; third, that the defendant acted knowingly and
13 willfully with the intent to deprive the government of the use
14 and benefit of its property; fourth, that the value of the
15 property was greater than \$1,000.

16 Now, I'll now explain each of the four elements in a
17 little more detail. The first element the government must
18 prove beyond a reasonable doubt is that the money or property
19 described in the indictment belonged to the United States
20 government. To satisfy this element the government must prove
21 that the money or property was a thing of value of the United
22 States. That means that at the time the money or property was
23 allegedly stolen, the United States government or an agency of
24 the United States government had either title to, possession of
25 or control over the property.

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1 The first element, there's no dispute in this case
2 that the property in question, tax refunds generated by the
3 IRS, qualify as property belonging to the United States.

4 Now, the second element the government must prove
5 beyond a reasonable doubt is that the defendant stole that
6 money or property. To steal money or property means to take
7 someone else's money or property without the owner's consent,
8 with the intent to deprive the owner of the value of that money
9 or property.

10 Now, the third element the government must prove
11 beyond a reasonable doubt is that the defendant acted knowingly
12 and willfully, with the intent to deprive the government of the
13 use or benefit of its property. As I have already explained,
14 to act knowingly means to act intentionally and voluntarily and
15 not because of ignorance, mistake, accident or carelessness.

16 To act willfully means to act with knowledge that
17 one's conduct is unlawful and with the intent to do something
18 the law forbids; that is to say, with the bad purpose to
19 disobey or disregard the law.

20 Whether the defendant acted knowingly and willfully
21 may be proven by the defendant's conduct and by all of the
22 circumstances surrounding the case.

23 And fourth, the fourth and final element the
24 government must prove beyond a reasonable doubt is that the
25 value of the property was greater than \$1,000.

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1 Now, in determining the value of the property stolen,
2 you may consider the aggregate or total value of the property
3 referred to in that count of the indictment. If you find that
4 the aggregate value is \$1,000 or less, then you must find the
5 defendant not guilty. On the other hand, if you find that the
6 aggregate value to be greater than \$1,000, then this element is
7 satisfied.

8 Now, finally, Counts Three, Six and Nine of the
9 indictment charge the defendant with aggravated identity theft.
10 The criminal statute provides in relevant part, whoever
11 knowingly transfers, possesses or uses, without lawful
12 authority, a means of identification of another person with the
13 intent to commit an unlawful activity that constitutes a
14 violation of federal law shall be guilty of a crime.

15 Now, to find the defendant guilty of Counts Three, Six
16 and Nine, aggravated identity theft, you must find beyond a
17 reasonable doubt the following three elements: First, that the
18 defendant transferred, possessed or used a means of
19 identification of another person; second, that the defendant
20 did so during and in relation to the theft of government funds
21 offense charged in Counts Two, Five and Eight; and third, that
22 the defendant acted knowingly and without lawful authority.

23 I'll now explain each of these three elements of the
24 offense in a little more detail. Now, the first element that
25 the government must prove beyond a reasonable doubt under

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1 Counts Three, Six and Nine is that the defendant transferred,
2 possessed or used a means of identification of another person.

3 Now, the terms transfer, possess and use have their
4 common sense meaning. The government need only prove one of
5 these.

6 The statute defines a means of identification as any
7 name or number that may be used alone or in conjunction with
8 any other information to identify a specific individual,
9 including any name, Social Security number, date of birth,
10 official state or government issued driver's license or
11 identification number or unique electronic identification
12 number, address or routing code or access device. In order to
13 prove this element beyond a reasonable doubt, the means of
14 identification must belong to an actual person other than the
15 defendant.

16 Now, the second element the government must prove
17 beyond a reasonable doubt under Counts Three, Six and Nine is
18 that the defendant transferred, possessed or used a means of
19 identification of another person during and in relation to the
20 theft of government funds offense charged in Counts Two, Five
21 and Eight respectively.

22 Now, during and in relation to means that the
23 defendant's transfer, use or possession of a means of
24 identification of another person had a role in or facilitated
25 or had the potential of facilitating the commission of the

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1 other offense.

2 Now, third, and finally, with respect to Counts Three,
3 Six and Nine, the government must also prove beyond a
4 reasonable doubt that the defendant acted knowingly and without
5 lawful authority in transferring, possessing or using the means
6 of identification of another person.

7 Again, to act knowingly means to act voluntarily and
8 deliberately, rather than mistakenly or inadvertent. With
9 regard to the defendant's knowledge on this count, the
10 government must prove beyond a reasonable doubt that the
11 defendant knew that the means of identification transferred,
12 possessed or used was that of an actual person.

13 To act without lawful authority means to use, transfer
14 or possess a means of identification without authorization from
15 the entity, government or otherwise, that issued the means of
16 identification.

17 Now, ladies and gentlemen, in addition to the elements
18 of each offense, you must consider whether any act in
19 furtherance of the crime occurred within the Southern District
20 of New York. That's called the venue requirement. You are
21 instructed that the Southern District of New York encompasses
22 Manhattan, Bronx, Westchester, Rockland, Putnam, Dutchess,
23 Orange and Sullivan Counties. In this regard the government
24 need not prove that the crime itself was committed in this
25 district or that the defendant himself was present here. It is

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1 sufficient to satisfy this element if any act in furtherance of
2 the crime occurred within this district. If you find that the
3 government has failed to prove that any act in furtherance of
4 the crime occurred within this district, then you must acquit.

5 Now, ladies and gentlemen, I'm going to give you a
6 verdict form. The verdict form will ask nine questions which
7 correspond to each one of the counts.

8 So to keep it simple for you, for example, it says
9 Count One, defrauding the United States with respect to claims.
10 How do you find the defendant, Messiah Clark, with respect to
11 the charge of defrauding the United States with respect to
12 claims in or about 2013? You check either not guilty or the
13 guilty box, depending on your unanimous decision.

14 And Count Two says that the federal funds, how do you
15 find defendant Messiah Clark with respect to the charge of
16 stealing federal funds in or about 2013? Again, you check not
17 guilty or guilty box, depending on your determination.

18 And Count Three, it says aggravated identity theft,
19 how do you find the defendant, Messiah Clark, with respect to
20 the charge of aggravated identity theft in or about 2013? You
21 check not guilty or guilty box, depending on your decision. It
22 goes right to the other counts with regard to the charges for
23 the 2008, 2009 and 2011 time periods, and I believe there's a
24 2010 time period. So as to each count, you decide on what your
25 unanimous verdict is, you check the appropriate box, then the

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1 foreperson needs to sign and date, all right?

2 Now, you're about to go into the jury room and begin
3 your deliberations. If during those deliberations you want to
4 see any of the exhibits, they will be sent to you in the jury
5 room upon your request. If you want any of the testimony read
6 back, that can be also done. But please remember that it's not
7 always easy to locate exactly what you might want, so be as
8 specific as possible, as you possibly can in requesting
9 exhibits or portions of testimony that you may want, if you
10 make such a request. Your request for exhibits or testimony --
11 in fact, any communications with this Court -- should be made
12 to me in writing, signed by your foreperson and given to the
13 marshal who will be outside your door. I will respond to any
14 questions or requests you have as promptly as possible by
15 sending in the exhibits requested or by having you return to
16 the courtroom so I can speak with you in person.

17 In any event, do not tell me or anyone else how the
18 jury stands on the issue of whether or not the defendant's
19 guilt has been proven beyond a reasonable doubt until after a
20 unanimous verdict is reached. When you have reached a
21 unanimous verdict, as I say, just send me a note, send in some
22 notes saying you've reached a verdict, a separate note. Don't
23 send out the verdict form. You just keep it and don't tell us
24 what the verdict is in that note. Just say, your Honor, we've
25 reached a unanimous verdict on all counts, and we will then

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1 bring you out to the courtroom and take the verdict from the
2 foreperson.

3 Now, when you get into the jury room, before you begin
4 your deliberations, you should select someone to be the
5 foreperson. The foreperson will be responsible, as I said, for
6 signing all communications to the court and for handing them to
7 the marshal during your deliberations. And we'll take your
8 signed and dated verdict sheet from your foreperson after you
9 return to court and ask your foreperson to stand up and
10 announce the verdict as to each count. We'll ask those
11 questions to you here in open court.

12 Now, the government, as I said, to prevail must prove
13 the essential elements of the charged crimes by the required
14 degree of proof. As I already explained in these instructions,
15 if it sustains its burden, your verdict should be guilty. If
16 it does not, your verdict should be not guilty. To report a
17 verdict, as I say, of either guilty or not guilty on any
18 particular count against the defendant, your verdict must be
19 unanimous. You must agree on each count as to how to find the
20 defendant with regard to each one of the charges.

21 Now, each juror's entitled to his or her opinion.
22 Each should have exchanged views with his or her fellow jurors.
23 That is the very purpose of jury deliberation, to discuss and
24 consider the evidence, to listen to the arguments of your
25 fellow jurors, to present your individual views and to consult

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1 with one another and to reach an agreement based solely and
2 wholly on the evidence, if you can do so without bias to your
3 own individual judgment. Each of you must decide the case for
4 yourself, after consideration with your fellow jurors of the
5 evidence in the case.

6 But you should not hesitate to change an opinion
7 which, after discussion with your fellow jurors, appears to be
8 erroneous. However, if, after carefully considering all of the
9 evidence and the arguments of your fellow jurors, you entertain
10 a conscientious view that differs from the other jurors, you're
11 not to yield your position simply because you're outnumbered.
12 Your final vote must reflect your conscientious determination
13 as to how the issues should be decided. Your verdict on each
14 count charged against the defendant, whether guilty or not
15 guilty, as I say, as a jury must be unanimous.

16 Now, if you do not understand or have forgotten any
17 portion of my instructions, you may request that any portion of
18 my instructions be read back, clarified or explained.

19 Let me just see the lawyers at the side bar for one
20 second, then we'll be ready to send you in.

21 (At side bar)

22 THE COURT: Did the government have any objections to
23 the charge?

24 MS. CUCINELLA: No.

25 THE COURT: Defense have any objections to the charge?

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1 MR. YANNELLA: No.

2 THE COURT: Okay. Then I'm going to go ahead and
3 excuse the four alternates. It's fair early here. We'll get
4 them in now. Their lunch is going to be here in about 20
5 minutes.

6 (In open court; jury present)

7 THE COURT: First of all, ladies and gentlemen, the
8 last four jurors -- we have 12 jurors ahead of you ready to
9 continue, enter into their deliberations. So I'm going to
10 excuse you from any further jury service at this time.
11 Obviously your service as jurors assured the continuation of
12 the trial, had we lost one of the first 12 jurors or any of the
13 first 12 jurors, and they've now been able to continue.

14 So I want to thank you for your participation and the
15 careful attention that you gave to the presentation of the
16 evidence, but I'm not going to make you stay any longer. I've
17 ordered lunch for 12:45. If you want to stick around and get
18 your lunch, you can. If you want to leave, you can. It's up
19 to you. But you're discharged from any further jury service
20 with the thanks of the Court. Thank you very much.

21 If you have any items in the jury room, personal
22 items, you can take those out. You're free to discuss the case
23 with each other or anyone else or the parties, other than our
24 12 jurors. Thank you very much, ladies and gentlemen.

25 As I indicated, ladies and gentlemen, I ordered your

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Charge

1 lunch. It should be here about 12:45. So I'm going to send
2 you in to begin your deliberations. And when your lunch
3 arrives, we're just going to have the marshal send it in to
4 you. You can eat while you continue to deliberate, or you can
5 suspend your deliberations while you eat and continue after
6 that. It's all up to you how you want to conduct yourself.

7 Can we swear in the marshal.

8 (Jury marshal sworn)

9 THE COURT: Ladies and gentlemen, you can now retire
10 to begin your deliberations.

11 (Jury retired to deliberate. Time noted: 12:23 p.m.)

12 THE COURT: What I do, I'd just stick around, take 15
13 minutes to see if they have any immediate requests for exhibits
14 or anything. Just make sure you agree on what's in evidence.
15 If they request an exhibit, as long as both sides agree what it
16 is that they're requesting and that it's in evidence, we don't
17 have to get back on the record. We can just send it in. If
18 they have any other note for any other request, then we'll
19 gather back here.

20 Just be no more than ten minutes away so we can -- let
21 my law clerk know where we can reach you. But if we don't hear
22 from them in the next ten, 15 minutes, as I said, their lunch
23 should be arriving sometime around that, so you can probably
24 get yourself some lunch. But just sort of check back with us
25 about 45 minutes after that, all right?

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Charge

1 (Recess pending verdict)

2 (In open court)

3 THE COURT: We have a verdict, so we'll bring the jury
4 out and take the verdict. Can we get the jury -- wait. Ask
5 the court officer.

6 (In open court; jury present. Time noted: 1:42 p.m.)

7 THE COURT: Ladies and gentlemen, we received your
8 note indicating that you've reached a verdict. I'm going to
9 ask my law clerk to take the verdict from the foreperson at
10 this time.

11 THE LAW CLERK: Will the foreperson please stand.

12 Count One, how do you find the defendant, Messiah
13 Clark, with respect to the charge of defrauding the United
14 States with respect to claims in or about 2013?

15 THE FOREPERSON: Guilty.

16 THE LAW CLERK: Count Two, how do you find the
17 defendant, Messiah Clark, with respect to the charge of
18 stealing federal funds in or about 2013?

19 THE FOREPERSON: Guilty.

20 THE LAW CLERK: Count Three, how do you find the
21 defendant, Messiah Clark, with respect to the charge of
22 aggravated identity theft in or about 2013?

23 THE FOREPERSON: Guilty.

24 THE LAW CLERK: Count Four, how do you find the
25 defendant, Messiah Clark, with respect to the charge of

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Charge

1 defrauding the United States with respect to claims from in or
2 about 2008 to 2009?

3 THE FOREPERSON: Guilty.

4 THE LAW CLERK: Count Five, how do you find the
5 defendant, Messiah Clark, with respect to the charge of
6 stealing federal funds from in or about 2008 to 2010?

7 THE FOREPERSON: Guilty.

8 THE LAW CLERK: Count Six, how do you find the
9 defendant, Messiah Clark, with respect to the charge of
10 aggravated identity theft from in or about 2008 to 2009?

11 THE FOREPERSON: Guilty.

12 THE LAW CLERK: Count Seven, how do you find the
13 defendant, Messiah Clark, with respect to the charge of
14 defrauding the United States with respect to claims in or about
15 2011?

16 THE FOREPERSON: Guilty.

17 THE LAW CLERK: Count Eight, how do you find the
18 defendant, Messiah Clark, with respect to the charge of
19 stealing federal funds in or about 2011?

20 THE FOREPERSON: Guilty.

21 THE LAW CLERK: Count Nine, how do you find the
22 defendant, Messiah Clark, with respect to the charge of
23 aggravated identity theft in or about 2011?

24 THE FOREPERSON: Guilty.

25 THE COURT: All right, ladies and gentlemen. I'm

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Charge

1 going to thank you very much for your jury service. Obviously
2 jury service is one of the most important responsibilities we
3 all have as citizens. Our process couldn't work unless we had
4 people who were willing to serve as fair and impartial jurors,
5 and I understand that many times it's a minor or major
6 disruption in both your personal and professional lives. We
7 tried to move the case efficiently for you. Luckily we did do
8 it in less time than we thought we would do it. But I
9 appreciate the time and effort that you put in the case and
10 attention you gave to the case. And I thank you on behalf of
11 all parties.

12 At this point I'm going to excuse you from any further
13 jury service. Thank you very much.

14 (Jury dismissed)

15 THE COURT: We're going to schedule sentencing for
16 February 5th at 10:00.

17 MR. YANNELLA: That's fine, your Honor.

18 THE COURT: Anything further by the government?

19 MS. CUCINELLA: Yes, your Honor.

20 The government would ask that the Court remand the
21 defendant at this time. He has now been convicted of nine
22 counts. He is facing a mandatory minimum of at least two
23 years. The government is going to ask that the Court consider
24 a six-year mandatory minimum, given all three 1028 charges
25 here. His guidelines, after we calculate the loss amount and

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Charge

1 the intended loss amount, will be close to ten years.

2 We have seen through the proof in this trial that the
3 defendant has access to cash. We have seen that he has -- we
4 can represent to the Court that he has renewed his subscription
5 in FEINsearch. While we have not yet been able to link him
6 directly to additional fraudulent accounts, we believe he is
7 engaging in the same activity he was engaging in that led to
8 these charges.

9 Additionally, with respect to risk of flight, we also
10 note that the defendant's family has recently moved out of the
11 family home. Given all of this, given the impending jail time
12 and all of the proof that the Court has seen, we believe it's
13 appropriate for him to be remanded at this time.

14 THE COURT: Mr. Yannella?

15 MR. YANNELLA: Your Honor, he's 39 years old. He has
16 very strong community ties. He was born in the Bronx. He
17 lives in Orange County. He is married. His wife is employed.
18 They have an eight-year-old child. He can't flee. If he were
19 to flee, as I argued earlier when they made an application to
20 have him remanded, he wouldn't have access to medical care and
21 his wife would have to leave her job. And they wouldn't be
22 able to support their eight-year-old child.

23 He's proven he's reliable to come to court, and that's
24 because every day he's been here at least a half hour before
25 court begins. I think he arrives usually at 9:00, and today he

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Charge

1 was here about 8:45 in the morning. He appeared after the
2 government made an application to have him remanded before.
3 And I think the fact that he did that knowing that they wanted
4 to put him in, and as this trial developed he continued to
5 come, knowing that if they convicted him, they were going to
6 seek to remand him, proves that he's willing to return.

7 I would ask that your Honor leave the bail conditions
8 as they are.

9 THE COURT: Defendant has just been convicted of very
10 serious charges. I think he's a considerable risk of flight
11 and even possibly a danger to the community, given the new
12 allegations that the government has made.

13 I think it's time at this point to remand the
14 defendant to assure his appearance for sentence. He's going to
15 be remanded to the custody of the marshals for sentence,
16 surrender to the marshals, and he will be remanded until
17 sentence.

18 I'll see everyone on February 5th at 10:00.

19 (Adjourned)
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